86-822

NO.

Supreme Court, U.S.
FILED
NOV 20 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE HOME INSURANCE COMPANY, *et al.*,

Petitioners,

v.

ELI LILLY AND COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

(1) Was the District of Columbia Circuit correct in holding — contrary to the decisions of five other circuits — that it would consider "no quantum of evidence" from insurers on the existence or absence of injury, even though determination of when injury occurs is a prerequisite to application of the insurance policies at issue?

(2) Where unsettled questions of state law are certified to a state supreme court, is the certifying federal court bound by the determinations of fact made by the state court?

(3) May a state promulgate a rule of law prohibiting insurers from presenting any evidence whatever on contested factual matters?

(4) When a new rule of state law is first authoritatively articulated by a state court in response to certified questions, and federal constitutional challenges to that new rule are then promptly raised by petition for rehearing in the state court and considered by that court on the merits, are the parties' federal constitutional arguments nonetheless waived for the purposes of further federal proceedings?

LIST OF PARTIES

Petitioners consist of the following insurance companies, except as noted, who appeared below as defendants-appellants urging reversal of the District Court:

The Aetna Casualty and Surety Company
Pacific Indemnity Company
Federal Insurance Company
American Home Assurance Company
Lexington Insurance Company
The Insurance Company of the State of Pennsylvania
National Union Fire Insurance Company of Pittsburgh, Pa.
The Home Insurance Company
The Mutual Fire, Marine and Inland Insurance Company
Falcon Insurance Company
American Employers' Insurance Company
Insurance Company of North America
California Union Insurance Company
Horace Mann Insurance Company
The Travelers Indemnity Company
Interstate Fire & Casualty Company
Interstate Indemnity Company
St. Paul Fire and Marine Insurance Company
American Motorists Insurance Company
Lumbermens Mutual Insurance Company
Fireman's Fund Insurance Company
Zurich Insurance Company
International Surplus Lines Insurance Company
Central National Insurance Company of Omaha
The Continental Insurance Company
Continental Casualty Company
Employers Insurance of Wausau — A Mutual Company
Eagle Star Insurance Company Ltd. (Canada)

First State Insurance Company
Admiral Insurance Company
Argonaut Insurance Company
*Northeastern Insurance Company of Pennsylvania
*Midland Insurance Company
*Mission Insurance Company
National American Insurance Company of New York
North Star Reinsurance Corporation
The Seven Provinces Insurance Company Ltd.
Unigard Security Insurance Company
Globe Indemnity Company
American Re-Insurance Company
General Reinsurance Corporation
Riunione Adriatica Di Sicurta

In addition to the foregoing insurance companies, petitioners include the following listed subscribers to percentages of policies issued through the London insurance market, who appeared below as defendants-appellants urging reversal of the District Court:

Allan Peter Denis Haycock, a representative underwriter representing certain underwriters at Lloyd's, London

Paul Malcolm Johnson, a representative underwriter representing certain underwriters at Lloyd's, London

Accident and Casualty Insurance Company
Accident and Casualty Insurance Company of Winterthur
Agrippina Versicherung A.G.
Alba General Insurance Company Ltd.
Andrew Weir Insurance Company Ltd.
Anglo-French Insurance Company Ltd.
Argonaut Northwest Insurance Company
American Star Insurance Company

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*Insurers presently insolvent, in liquidation, or suspended by regulatory authorities.

Assicurazioni Generali di Trieste e Venezia S.P.A.
Baloise Fire Insurance Company Ltd.
Bellefonte Insurance Company
Bermuda Fire & Marine Insurance Company Ltd.
Bishopsgate Insurance Company Ltd.
*British Commercial Insurance Company
British National Insurance Company Ltd.
British & Overseas Insurance Company
City General Insurance Company Ltd.
Delta-Lloyd Non Life Insurance Company Ltd.
The Dominion Insurance Company Ltd.
Drake Insurance Company Ltd.
Edinburgh Assurance Company Ltd.
English and American Insurance Company Ltd.
European General Reinsurance Company of Zurich
Excess Insurance Company Ltd.
Fidelidade Insurance Company of Lisbon
General Insurance Company Ltd.
Guildhall Insurance Company Ltd.
Helvetia Accident Swiss Insurance Company
Highlands Insurance Company
Hull Underwriters Association
Lexington Insurance Company
London & Edinburgh General Insurance Company Ltd.
The London and Overseas Insurance Company Ltd.
The Mercantile & General Reinsurance Company plc
Minster Insurance Company Ltd.
Mutual Reinsurance Company Ltd.
National Casualty Company
National Casualty Company of America Ltd.
North Atlantic Insurance Company Ltd.

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*Insurers presently insolvent, in liquidation, or suspended by regulatory authorities.

The Orion Insurance Company Ltd.
River Thames Insurance Company Ltd.
*St. Helens Insurance Company Ltd.
St. Katherine Insurance Company Ltd.
Scottish Lion Insurance Company Ltd.
Southern American Insurance Company
Southern Insurance Company
Sovereign Marine & General Insurance Company Ltd.
Sphere Insurance Company Ltd.
Stronghold Insurance Company Ltd.
Swiss National Insurance Company
Swiss Union General Insurance Company Ltd.
Terra Nova Insurance Company Ltd.
Turegum Insurance Company
Unionamerica Insurance Company Ltd.
United Standard Insurance Company Ltd.
Victory Insurance Company Ltd.
Walbrook Insurance Company Ltd.
The World Auxiliary Insurance Corporation Ltd.
The British Aviation Insurance Company Ltd.
General Reinsurance Syndicate Ltd.
Guardian Royal Exchange Assurance plc
Reinsurance Group Managers

Information regarding parents, affiliates, and subsidiaries of the foregoing petitioners required by Rule 28.1 of the Rules of the Supreme Court are listed in Appendix G, bound herewith.

Respondent Eli Lilly & Company was plaintiff-appellee below urging affirmance of the District Court.

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*Insurers presently insolvent, in liquidation, or suspended by regulatory authorities.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No.

THE HOME INSURANCE COMPANY, *et al.*,

Petitioners,

v.

ELI LILLY AND COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioners, defendants-appellants in the proceedings below, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on June 24, 1986.

OPINIONS BELOW

The June 24, 1986, opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 794 F.2d 710 and reproduced in Appendix A herein at 1a. The September 12, 1985, opinion of the Supreme Court of Indiana in response to certified questions, as well as that court's orders granting leave to file petitions for rehearing and denying the petitions, are reproduced in Appendix B herein at 1b, 8b, and 11b, respectively, and the opinion is reported at 482 N.E.2d 467. The June 18, 1985,

opinion of the District of Columbia Circuit, certifying questions to the Supreme Court of Indiana, is reported at 764 F.2d 876 and reproduced in Appendix C herein at 1c. The judgment, modifying order, and memorandum opinion of the United States District Court for the District of Columbia, dated April 12, 1984, and May 30, 1984, appear in Appendix D herein at 1d, 2d, and 3d, respectively; they are unreported.

JURISDICTION

The court of appeals judgment affirming the district court was entered on June 24, 1986. Appendix E at 1e. On August 22, 1986, the court of appeals denied timely petitions for rehearing and a suggestion for rehearing *en banc*. Appendix E at 3e, 5e. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES OF COURT INVOLVED

The pertinent provisions of the United States Constitution (amend. V and amend. XIV, § 1), federal statutes (28 U.S.C. §§ 1652, 2071 and 2072; Pub. L. No. 95-595, 88 Stat. 1926 (1975) (enacting the Federal Rules of Evidence)), federal rules (FED. R. CIV. P. 56(c); FED. R. EVID. 101, 401, 402, and 1101), and the Indiana Rules of Appellate Procedure (IND. R. APP. P. 11(A) and 15(O)) are set forth in Appendix F herein.

STATEMENT OF THE CASE

1. Proceedings in the District Court

Eli Lilly and Company ("Lilly"), a major pharmaceutical manufacturer, brought this action in the United States District Court for the District of Columbia seeking a declaration pursuant to 28 U.S.C. § 2201 how its insurance contracts applied to claims arising from the use of the drug diethylstilbestrol ("DES"). Jurisdiction was based on diversity of citizenship. 28 U.S.C. § 1332.

The defendants were more than 50 domestic and foreign insurers (the "insurers") who, between 1942 and 1976, negotiated with and issued to Lilly 242 separate general liability insurance policies. Lilly had sold DES between 1947 and 1967 for uses associated with pregnancy. Since 1973, Lilly has been sued in approximately 650 tort actions based on allegations that ingestion of DES by pregnant women caused vaginal cancer or other reproductive tract disorders in the daughters who were *in utero* at the time of the DES ingestion. In the typical case diagnosis of the disease or disorder in the daughter occurs fifteen years or more after maternal ingestion, and the actual point of onset is a matter hotly in dispute.

The basic issue in Lilly's declaratory action was what must happen under the terms of Lilly's insurance contracts to invoke coverage for particular DES claims — a concept sometimes described as the "trigger of coverage." The contracts themselves required that "injury" must result during the policy period to trigger coverage. "Injury" was usually defined to mean "bodily injury, mental injury, . . . sickness, or disease." The precise point of injury, however, was of crucial importance because the amounts of coverage purchased by Lilly, the size of its self-insured retentions, and the identity of its insurers all varied significantly over the years of Lilly's coverage.

Lilly moved for summary judgment seeking the benefit of the so-called "continuous injurious process/multiple trigger" holding of *Keene Corp.* v. *Insurance Co. of North America,* 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied,* 455 U.S. 1007 (1982) (White, Blackmun and Powell, JJ., dissenting).[1] The insurers, who had

[1] Though denying that DES caused injury of any kind, Lilly maintained that DES-related injury claims necessarily involved a continuous injurious process and, therefore, that coverage was triggered by ingestion of DES, manifestation of the disease or disorder said to result, and at each point between those two events. Lilly further contended that it had the unilateral right to choose, for each claim, which particular trigger to use and hence which policy should apply.

made a jury demand, opposed summary judgment, presenting evidence through depositions, documents, and medical affidavits of what they asserted to be disputed material facts, *e.g.*, that DES-related injury was not a continuous injurious process; that there was no injury at all during the period between ingestion and manifestation; that Lilly had been actively engaged in negotiating the policies; and that Lilly, not the insurers, was the original draftsman of the terms at issue and had insisted on their use long before they became more generally prevalent.

The district court, however, granted summary judgment to Lilly. It held that Indiana law controlled the interpretation of the contracts at issue. The court also held it was "clear" that the policies required injury to occur during the policy period in order to trigger coverage, but found the terms defining injury — "bodily injury, . . . sickness or disease" — to be ambiguous. App. D at 16d. Although the court referred to certain medical literature on the chronology of DES-related conditions, App. D at 4d-5d & nn.3, 5 & 7, 11d n.14, it made no other specific findings of fact, either on etiology or any other factual matter. To the contrary, the court concluded all facts submitted by the insurers were immaterial under Indiana law, which, the court said, would construe the policy language to give effect to the parties' reasonable expectations without reference to any extrinsic evidence. Since the *Keene* decision, as the district court read it, also proceeded without reference to extrinsic evidence, the district court held *Keene* would likely be adopted as the law of Indiana and so granted Lilly's motion.

2. Certification By the Court of Appeals

On appeal the insurers argued that even if the district court were correct in holding that negotiation, drafting and actual intent were immaterial under Indiana law,[2] still on the district court's own the-

[2] The insurers by no means conceded that the District Court had been right about Indiana law, but to the contrary, argued that Indiana law required the determination of actual intent and precluded application of the doctrines of adhesion contracts when the contracts had been vigorously negotiated by partners of equal bargaining strength.

ory certain evidence necessarily had to be considered. Specifically, if it was "clear" that coverage was triggered only upon DES "injury" during the policy period (as the district court found), then the court ought to have considered the insurers' evidence that DES did not involve a continuous injurious process and that there was no "injury" between the points of ingestion and manifestation. Similarly, if Indiana law imposed a doctrine of objective reasonable expectations, rather than actual intent, the district court should have considered the insurers' evidence that, given the nature of the pharmaceutical business, a reasonable insured in Lilly's position could not objectively have expected multiple-trigger coverage.

The court of appeals accepted the district court's choice of Indiana law but found itself "uncertain as to the validity of [the district court's] holdings" with respect to the materiality of the insurers' evidence and the multiple-trigger declaration. App. C at 13c. Accordingly, pursuant to Indiana's certification procedure,[3] a divided panel certified three questions to the Indiana Supreme Court and deferred decision on the merits. These questions were:

"1. Under Indiana insurance contract law, should the types of extrinsic evidence proferred by the insurers be considered in the interpretation of the disputed 'trigger' provisions?

2. If any aspect of the insurers' extrinsic evidence should be considered, would Indiana courts require a determination of the parties' actual intent concerning the application of the 'trigger' provision to delayed manifestation injuries? Or would Indiana courts permit a determination, after consideration of the extrinsic evidence, that the parties did not hold or convey a clear understanding of the trigger provision's applicability to delayed manifestation injuries and that, thus, the provision must be interpreted by the court as a matter of Indiana insurance law?

3. If the insurers' extrinsic evidence should not be considered, or if that evidence is not determinative of the parties' intent,

[3] Ind. R. App. P. 15(O), App. F at 7f-8f. The Indiana procedure does not permit certification by United States District Courts, and hence was available for the first time in this case on appeal.

how should the insurance policy provision at issue be interpreted under Indiana law? In other words, would Indiana courts adopt an exposure, a manifestation, a multiple trigger, or some other interpretation of the 'injury'/'occurrence' language in Eli Lilly's policies?" App. C at 17c.

3. The Indiana Decision

The Indiana Supreme Court answered that the insurers' evidence would not be considered in Indiana and that Indiana would adopt a multiple trigger.[4] App. B at 1b. The court cited an Indiana policy favoring indemnity as the sole basis for refusing to consider the insurers' case: "[t]his objective of promoting coverage leads us to the conclusion that consideration of the [insurers'] extrinsic evidence is unnecessary to interpretation of the policies." *Id.* at 6b. The same policy of promoting indemnity was invoked as the basis for the court's multiple-trigger answer, with the qualification that this outcome "give[s] effect to the reasonable expectations of the insured." *Id.* at 7b.

The Indiana decision rests on three conclusions that would usually be made by a fact finder.[5] First, regarding the time of injury, the Indiana Supreme Court noted that "at least two possible time considerations, exposure and manifestation, are relevant." *Id.* at 5b. The court made no reference to points between ingestion and manifestation, but apparently assumed that "injury" occurs continuously between those two points. Such an assumption would have been consistent with the court's observation that "the determinative question" is "when the DES-related 'injury' 'occurs' for purposes of the policies," *id.* at 4b, and with its acknowl-

[4] In view of its answer to the first certified question, the Indiana court found it unnecessary to answer the second. App. B at 6b.

[5] Whether these points are "matters of law" on which a federal court exercising diversity jurisdiction would be obliged to defer to a state court, or "matters of fact" on which such deference is constitutionally impermissible is a question central both to the orderly operation of federal system, and to this petition. *See infra* pp. 10-18.

edgement that something "must happen during a particular policy period to invoke insurance coverage for that period," *id.* at 1b. Second, the Indiana Supreme Court resolved the factual question of what constituted the "reasonable expectations" of the insured, saying that:

> "based on the relevant policy language, Lilly could have reasonably formed an expectation that it was purchasing insurance coverage for all future liability arising from the manufacturing and selling of DES." *Id.* at 6b.

Finally, the Indiana Supreme Court made the factual determination that "[t]he language in Lilly's policies concerning what must happen during a particular policy period to trigger coverage for that period is ambiguous . . .," *id.* at 5b, and should therefore be construed strictly against the insurers to further the policy's basic purpose of indemnity.[6] *Id.* at 6b.

The insurers filed a timely petition for rehearing accompanied by a motion for leave to submit such a petition.[7] In their petition the insurers argued, *inter alia,* that the factual premises of the decision were inconsistent with the sweeping answers Indiana had given and that, left unmodified, the decision would work a fundamental change in state law that violated the insurers' constitutional rights. The Indiana Supreme Court granted the insurers' motion for leave to submit this petition "in light of this Court's policy to consider questions on the merits when possible," App. B at 9b, then denied rehearing without any further opinion, *id.* at 11b.

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[6] In applying this analysis the Indiana court was, in its words, relying on "rules of construction favoring the *non-drafter* of insurance contract terms." App. B at 5b (emphasis added). The identity of the drafter was one of the issues to which the disputed evidence was directed, but the Indiana court apparently deemed the insurers to have been the drafters.

[7] The Indiana Rules of Appellate Procedure do not contemplate briefing or oral argument in certified cases prior to decision, and none was requested by the Indiana court. These rules do, however, permit such additional submissions on rehearing. IND. R. APP. P. 11(A); *see* App. B at 9b.

4. The Court of Appeals Post-Certification Decision

Following transmission of Indiana's answers to the District of Columbia Circuit, the insurers raised by supplemental briefing the serious issues of federal law created by the Indiana decision. The insurers contended that the Indiana decision, fairly read, rested on factual findings or assumptions about when DES-related injury occurs, what expectations were objectively reasonable, and who drafted the wording at issue. In a diversity action, however, federal law determined what evidence was relevant to proof of those facts and what quantum of evidence should defeat summary judgment. The Indiana Supreme Court's factual conclusions and any state evidentiary rules on which they implicitly rested were therefore not binding and could not be the basis for affirming summary judgment. The insurers further argued that if the Indiana decision did constitute a binding determination that all facts were immaterial — even those pertaining to when DES injury occurs — then fundamental constitutional rights would be violated by its application.

The court of appeals read the Indiana decision to hold that only one of the facts referred to by the Indiana Supreme Court was a necessary predicate to its decision. App. A at 6a-10a. Specifically, the court said that the Indiana court's findings as to reasonable expectations and references to draftsmanship were mere *dicta.* With regard to what must happen during a policy period to trigger coverage, the court deemed there to be an "importance [to] the quotation marks" around the terms "injury" and "occurs" in the Indiana decision that made those contract requirements "terms of art" having "a somewhat artificial legal meaning." *Id.* at 10a. (The court did not say, however, what that "somewhat artificial legal meaning" was.) The only fact that mattered, in the court of appeals' view, was the Indiana court's factual determination that the contract terms were ambiguous:

> "In sum, the only factual predicate of the rule that insurance contracts should be construed against the insurer is the require-

ment that the contract be ambiguous. *Once that factual predicate was satisfied no quantum of evidence* on the issues of authorship, intent, or etiology should have defeated a motion for summary judgment." *Id.* at 10a (emphasis added).

Finally, the court of appeals refused to entertain the insurers' federal constitutional objections to the principles of state law first authoritatively articulated in the Indiana decision. *Id.* at 10a-12a. The court found that the insurers could not reasonably have been expected to raise their constitutional challenges in the district court, but it held those objections waived because not articulated in initial briefing to the court of appeals before the state decision. *Id.* at 11a-12a & n.13.

The insurers subsequently filed their Petition for Rehearing and Suggestion for Rehearing *En Banc,* raising the arguments made herein. That petition and suggestion were denied on August 22, 1986. App. E at 3e, 5e. The present Petition for Certiorari followed.

REASONS FOR GRANTING THE WRIT

I. THE DISTRICT OF COLUMBIA CIRCUIT'S REFUSAL TO CONSIDER EVIDENCE WITH RESPECT TO WHEN INJURY OCCURS IS AN ABDICATION OF FEDERAL FACT-FINDING RESPONSIBILITY AND IS CONTRARY TO THE DECISIONS OF FIVE OTHER CIRCUITS.

For nearly a decade the federal courts have been grappling with diversity actions over insurance coverage for time-delayed claims. Asbestos, DES, and environmental pollution have all given rise to massive insurance lawsuits. Six different United States Courts of Appeals, purporting to follow state law, have now rendered four different, directly conflicting interpretations of substantially the same policy language.[8] Three circuits have held the language to be ambiguous; two have found it unambiguous. In the District of Columbia Circuit itself within the space of six weeks the language has been characterized as both

[8] *Compare American Home Prods. Corp.* v. *Liberty Mutual Ins. Co.*, 748 F.2d 760 (2d Cir. 1984) ("*AHP*") (unambiguous policy language requires actual injury from DES to be shown by evidence) *with Hancock Labs.* v. *Admiral Ins. Co.*, 777 F.2d 520 (9th Cir. 1986) ("*Hancock Labs*") (ambiguous policy language, coverage triggered solely by exposure to medical product); *Porter* v. *American Optical Corp.*, 641 F.2d 1128 (5th Cir.), *cert. denied*, 454 U.S. 1109 (1981) ("*Porter*") (ambiguous policy language, coverage triggered solely by exposure to asbestos); *Insurance Co. of N. Am.* v. *Forty-Eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980), *cert. denied*, 454 U.S. 1109 (1981) ("*Forty-Eight*") (ambiguous policy language, coverage triggered solely by exposure to asbestos) *and with Eagle-Picher Industries, Inc.* v. *Liberty Mutual Ins. Co.*, 682 F.2d 12 (1st Cir. 1982), *cert. denied*, 460 U.S. 1028 (1983) ("*Eagle-Picher*") (unambiguous policy language, coverage triggered solely by manifestation of asbestos-related condition). The court in *Keene Corp.* v. *Insurance Co. of N. Am.*, 667 F.2d 1034, 1041 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982) (White, Blackmun and Powell, J.J., dissenting), observed that the policy language was ambiguous but declined to rely on that basis for creating its continuous injury/multiple-trigger theory. Three circuits rendering coverage deci-

ambiguous and unambiguous — and two entirely inconsistent interpretations have been implemented.[9] Such inconsistencies alone have prompted calls for review by this Court.[10]

In one respect, however, the federal decisions prior to this one have been consistent. While each has been subject to substantive rules of state law (and these might be found to vary), each has also recognized a federal responsibility to consider contractual language in light of the particular facts of the claims of injury to which the contracts were to be applied. The courts of appeals in *Eagle-Picher, Forty-Eight, Porter,* and *Hancock Labs, supra* n.8, each relied on medical evidence in the record to reach their decisions on the meaning of injury and, indeed, on whether that term was ambiguous in a particular factual application, or not. *Eagle-Picher,* 682 F.2d at 18-19; *Forty-Eight,* 633 F.2d at 1218; *Porter,* 641 F.2d at 1144; *Hancock Labs,* 777 F.2d at 524. In *Abex, AHP,*

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sions after *Keene* have expressly rejected that theory, *Hancock Labs*, 777 F.2d at 524; *AHP,* 748 F.2d at 764; *Eagle-Picher*, 682 F.2d at 23, and a fourth has affirmed its single trigger exposure view, *Ducre* v. *Executive Officers of Halter Marine, Inc.*, 752 F.2d 976, 992-93 (5th Cir. 1985) ("*Ducre*").

[9] *Compare Abex Corp.* v. *Maryland Cas. Co.*, 790 F.2d 119 (D.C. Cir. 1986) ("*Abex*") *with* App. A. *Abex* said the policy language was unambiguous; *Lilly* said the same language was ambiguous. *Abex* held "injury" to be a factual issue requiring evidence; *Lilly* held "injury" to be an "artificial" legal concept. *Abex* reversed a *Keene* summary judgment; *Lilly* affirmed such a judgment.

[10] The "conceptual chaos" in this area prompted then-Judge Sofaer to urge directly that this Court intervene:

> "Review by the High Court would in fact be appropriate on this issue, despite the general wisdom of the Court's policy of avoiding state law questions. The disparities of construction among the federal courts is a matter of national concern, because many of the courts involved are not even attempting to apply state law in reaching their results, and because these rulings are having significant effects upon the victims of insidious diseases, upon manufacturers, and upon the insurance industry, throughout the nation." *American Home Prods. Corp.* v. *Liberty Mutual Ins. Co.*, 565 F.Supp. 1485, 1512 (S.D.N.Y. 1983), *aff'd as modified*, 748 F.2d 760 (2d Cir. 1984).

and *Ducre, supra* nn.8, 9, the courts of appeals expressly held that evidence of injury must be in the federal record before there could be coverage. *Abex,* 790 F.2d at 127-28; *AHP,* 748 F.2d at 765-66; *Ducre,* 752 F.2d at 994.

In the present case, however, the court of appeals found that Indiana gave precisely the same contract term — "injury" — a "somewhat artificial legal meaning," precluding, as a matter of law, any effort by insurers to show that no injury at all occurred during particular policy periods.[11] The District of Columbia Circuit could not have been clearer: on its view of Indiana law, "no quantum of evidence" regarding the particular claims of injury could prevent summary judgment for the insured.[12] App. A at 10a.

It is apparent that the position of the District of Columbia Circuit is in error, and the procedure followed by the First, Second, Fifth, Sixth and Ninth Circuits is the one that correctly satisfies federal obligations in a diversity action. Determining the meaning of contract language (including whether it is ambiguous or not) is a question of fact — to be answered in a diversity action

[11] As the court of appeals noted, insurers differed among themselves about what must happen to trigger coverage during a policy period. App. C at 7c. All insurers have steadfastly maintained since the commencement of this action, however, that *something* had to happen during a policy period and that for many of the periods potentially involved with particular DES claims, nothing did.

[12] The insurers do not believe the Indiana decision should have been read to go so far. It is inconceivable, for example, that a court which says that "the determinative question" is "when the DES-related 'injury' 'occurs' for purposes of the policies," is really trying to say that when injury occurs is *immaterial* to construction of the policies. *See* App. B at 4b. The court of appeals held, however, that the Indiana decision relied only on the "factual predicate" that the policies were ambiguous when applied to DES injury — a determination made without consideration of the insurers' evidence. It is as if, in an action on a fire insurance policy, the insurer was precluded as a matter of law from proving that the building had not suffered any fire damage at all during the insurer's policy period.

by the independent federal fact finder. *Dobson* v. *Masonite Corp.*, 359 F.2d 921, 923 (5th Cir. 1966); *Barclays Bank D.C.O.* v. *Mercantile National Bank*, 481 F.2d 1224, 1234 (5th Cir. 1973); 3 A. CORBIN, CORBIN ON CONTRACTS § 554, at 218 (1960); 4 WILLISTON ON CONTRACTS § 616, at 648 (Jaeger 3rd ed. 1961). Thus, for example, in *South Hampton Co.* v. *Stinnes Corp.*, 733 F.2d 1108 (5th Cir. 1984), a case involving the alleged ambiguity of a contract, the Fifth Circuit noted that a recent state court finding of ambiguity in a parallel proceeding was factual and did not discharge the Fifth Circuit's independent federal function:

> "[T]he question of what meaning a court should attribute to the words of a contract is a question of fact, and not one of law. . . . A later Texas court would not be bound by the [recent state] court's interpretation of the [contract provision], *nor are we.*" 733 F.2d at 1115 (emphasis added) (footnote omitted).[13]

Even allowing full sweep to the proposition that all the insurance contracts in the cases cited above are governed by state law, still no court of appeals except the District of Columbia Circuit in this case has ever sought to apply insurance policies to claims of injury (which are, by definition, extrinsic to the policy) while denying insurers the right to present evidence of the existence or not of such injuries.

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[13] This analysis has consistently been applied in that circuit. In *Paul Revere Life Ins. Co.* v. *First Nat'l Bank in Dallas*, 359 F.2d 641 (5th Cir. 1966) (en banc); *St. Paul Mercury Ins. Co.* v. *Price*, 359 F.2d 74 (5th Cir. 1966); and *United Services Life Ins. Co.* v. *Delaney*, 358 F.2d 714 (5th Cir. 1966) (per curiam) (en banc), the Fifth Circuit made an independent determination that certain policy language was not ambiguous after essentially the same language had been found by the Texas Supreme Court to be ambiguous. *See Continental Cas. Co.* v. *Warren*, 152 Tex. 164, 254 S.W.2d 762 (1953).

II. THE DISTRICT OF COLUMBIA CIRCUIT'S HOLDING THAT DETERMINATIONS OF FACT BY A STATE SUPREME COURT MADE IN RESPONSE TO CERTIFIED QUESTIONS ARE BINDING IN SUBSEQUENT FEDERAL PROCEEDINGS CONFLICTS WITH DECISIONS OF THIS COURT AND OF THE FIFTH CIRCUIT AND IMPROPERLY ABDICATES A FUNDAMENTAL RESPONSIBILITY.

Where diversity actions have involved unsettled questions of state law, this Court has often endorsed and itself employed the certification procedure. *E.g., Clay* v. *Sun Insurance Office Ltd.*, 363 U.S. 207 (1970) (directing circuit court to certify); *Zant* v. *Stephens,* 456 U.S. 410 (1982) (certifying question to Georgia Supreme Court). At least thirty-five states have now adopted rules permitting certification, and this procedure is increasingly employed in federal litigation.[14] Inherent in certification, however, is the constitutionally sensitive "issue of how to reconcile the exercise of the jurisdiction which Congress has conferred upon the federal courts with the important considerations of comity and cooperative federalism which are inherent in a federal system." *Lehman Brothers* v. *Schein,* 416 U.S. 386, 393-94 (1974) (Rehnquist, J. concurring). That balance was seriously disrupted in this case.

Here the court of appeals interpreted certification to permit a state court to resolve factual as well as legal issues in response to certified questions. The court of appeals held that the only material fact was whether the policy language was ambiguous in the con-

[14] *See* Note, *The Law/Fact Distinction and Unsettled State Law in the Federal Courts*, 64 TEX. L. REV. 157, 162 n. 42 (1985) (collecting provisions permitting certification in 34 states). In addition, New York has recently amended its constitution and court rules to permit certification. *See* N.Y. CONST. art. VI, § 3b(9) (1938, amended 1985) and N.Y. COMP. CODES, R. & REGS. tit. 22, § 500.17 (1986) (N.Y. Court of Appeals Rules of Practice § 500.17).

text of DES injury, App. A at 6a-7a, 10a, and the Indiana decision — not the court of appeals' own ruling — established that "factual predicate," *id.* at 7a. The court of appeals said:

> "The [Indiana] court, however, specifically held the language of the policies covering Eli Lilly to be ambiguous." App. A at 7a.[15]

It is apparent, therefore, that the court of appeals' holding was pure deference to Indiana.[16]

Decisions in the Fifth Circuit are in direct conflict with this improper abdication of federal fact-finding responsibility. In *Barnes* v. *Atlantic & Pacific Life Insurance Co.,* 514 F.2d 704 (5th Cir.

[15] When the court of appeals analyzed the language independently, only six weeks before its post-certification decision in this case, it held the very same policy language to be unambiguous. *Abex*, 790 F.2d at 127. The *Abex* court said that the language was, in its own view, susceptible to only one reasonable construction, and it reversed a multiple-trigger summary judgment entered by the district court. *See supra* pp. 10-11 & n.9.

Abex and *Lilly* cannot be reconciled on the basis that federal fact-finding was influenced by different state law standards. New York law provides that policy language is ambiguous "if susceptible of at least two fairly reasonable meanings," *Abex*, 790 F.2d at 125; likewise Indiana law finds policy language "ambiguous if reasonable persons may honestly differ as to the meaning of the policy language," App. B at 5b. It is thus logically impossible for identical language to be unambiguous under New York law and ambiguous under Indiana law.

[16] Of course the district court had previously found the terms "bodily injury," "sickness," and "disease" to be ambiguous in the context of insidious diseases. App. D at 16d. However, the court of appeals decision did not rest on the district court finding, nor could it have. In determining whether reasonable men could differ on meaning, the district court had referred only to facts proferred by Lilly, while explicitly declining to consider the insurers' evidence that during certain periods there was no injury. Insurers had complained on appeal that this one-sided approach to the facts of DES-related injury flatly violated Fed. R. Civ. P. 56. Whether for this reason or some other, the court of appeals did not rely on the district court's flawed finding. Instead, the court of appeals simply adopted the conclusion of Indiana given in response to its certified questions.

1975), the Fifth Circuit certified unsettled questions to the Alabama Supreme Court in an appeal of a federal summary judgment. Subsequently, the Fifth Circuit read Alabama's answers to define the issue material to decision (there, whether delay in issuing the policy was reasonable), but not to determine the relevance of evidence or to resolve that issue:

> "Whether Insurer's delay in issuing the policy was 'within the bounds of reasonableness' is a fact question which was not within the province of the Alabama [Supreme] Court. It is not for our determination either since this is the role of the Trial Court." *Barnes* v. *Atlantic & Pacific Life Insurance Co.*, 530 F.2d 98, 100 (5th Cir. 1976).

See also Tyler v. *Insurance Co. of North America*, 539 F.2d 1072, 1074 (5th Cir. 1976); *Nardone* v. *Reynolds*, 538 F.2d 1131, 1134 n.8 (5th Cir. 1976).

To be sure, "the determination of ambiguity, like other fact questions, will sometimes be a question to be answered by the judge and not the jury," *South Hampton Co.* v. *Stinnes Corp.*, 733 F.2d at 1115 n.5, but that determination unquestionably remains one of fact:

> "We must bear in mind, however, that this question of fact is like other questions of fact in this: it may be a question that should be answered by the judge rather than by the jury. In cases in which it is so answered, it is probable that the interpreting judge may say that interpretation of language is a 'question of law for the court.'" 3 A. CORBIN, CORBIN ON CONTRACTS § 554, at 220-21 (1960) (footnote omitted).

Fact-finding responsibility belongs to a federal court in a diversity action, *Tyler* v. *Insurance Co. of North America*, 539 F.2d at 1074, and that responsibility is expressly preserved in certification proceedings. The American Law Institute commented on the importance of that distinction in connection with its proposed federal certification statute:

> "The argument for certification, accepted by the Institute, is that it makes it possible for the federal court to obtain a quick

> and authoritative answer to difficult state law questions which the case may present *while preserving the parties' right to a federal determination of fact questions* and issues of federal law in the case." AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (Tent. Draft No. 6, 1968), Commentary § 1371, at 214 (emphasis added).

This critical importance of federal fact finding is uniformly stressed by the commentators.[17] Indeed, failure to preserve this federal fact-finding responsibility would produce a hitherto unknown form of abstention, directly contrary to this Court's admonition that abstention "'is the exception, not the rule.'" *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1, 14 (1983) (quoting *Colorado River Water Conservation District* v. *United States,* 424 U.S. 800, 813 (1976)).

The methods of federal fact finding are, of course, governed by federal law. A federal court reviewing summary judgment in a diversity action must apply the federal rules of evidence and procedure notwithstanding that these rules may lead to a different outcome than might obtain in a state court. *Hanna* v. *Plumer,* 380 U.S. 460 (1965). *See also* 28 U.S.C. § 1652.[18] Thus, while state law determines which facts are material to a summary judgment

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[17] Mattis, *Certification of Questions of State Law: An Impractical Tool in the Hands of the Federal Courts*, 23 U. MIAMI L. REV. 717, 723 (1969); Note, *Abstention and Certification in Diversity Suits: "Perfection of Means and Confusion of Goals,"* 73 YALE L. J. 850, 868-69 (1964); Note, *Inter-Jurisdictional Certification: Beyond Abstention Toward Cooperative Judicial Federalism*, 111 U. PA. L. REV. 344, 359 (1963); Comment, *Abstention Under Delaney: A Current Appraisal*, 49 TEX. L. REV. 247, 264 (1971).

[18] Federal rules adopted pursuant to the Rules Enabling Act, 28 U.S.C. §§ 2071, 2072, and the power afforded Congress under Article III constitute the core of the independent federal system, and to refuse to follow them in order to achieve uniformity of outcome "would be to disembowel" those powers. *Hanna* v. *Plumer*, 380 U.S. at 473-74. The Federal Rules of Evidence apply in diversity cases. *Compare* FED. R. EVID. 101 *with id.* 1101.

motion under Fed. R. Civ. P. 56, federal law determines whether the proffered evidence is relevant to the existence *vel non* of those facts, and hence must be admitted by the federal court and taken as true for purposes of deciding the motion.[19] Wellborn, *The Federal Rules of Evidence and the Application of State Law in the Federal Courts,* 55 TEX. L. REV. 371, 375, 396 (1977); 1 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE § 401[03], at 401-19 (1985).

If, therefore, ambiguity of the term "injury" is the *only* fact material to the application of more than 200 insurance contracts (as the court of appeals held), the proper exercise of federal diversity jurisdiction requires a federal determination of that fact based upon consideration of the evidence presented by both sides to the dispute.

III. A STATE RULE THAT DEPRIVES INSURERS OF ANY OPPORTUNITY TO PRESENT EVIDENCE IS CONSTITUTIONALLY DEFECTIVE.

The court of appeals read the Indiana decision to create rules of state law that preclude an insurer from contesting the factual assumptions on which those rules of law explicitly rest — such as whether there is a DES injury during a policy period and what expectations are objectively reasonable. If this is the law of Indiana, then its application violates fundamental constitutional rights, and so far departs from the usual course of judicial proceedings

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[19] Rule 402 expressly provides:

"*All relevant evidence is admissible*, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority." (Emphasis added.)

In federal proceedings, all evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401.

as to warrant correction by this Court. State substantive law may not preclude the right to a meaningful hearing before any fact finder, nor may a state create a class of contracting parties (even if they are insurers) who must always lose on an issue central to liability.

A. The Court Of Appeals' Application Of The Indiana Decision Deprived Insurers Of The Opportunity For A Meaningful Hearing.

The court of appeals has told insurers that there is "no quantum of evidence" they might proffer that could affect the outcome of this litigation, even evidence bearing on the factual predicates to decision.[20] To say that such a rule of law deprives insurers of any meaningful hearing is to state the obvious — such a rule deprives insurers of any hearing at all. *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 432-33 (1982); *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U.S. 673, 678 (1930).

Due process requires "an opportunity . . . granted at a meaningful time and in a meaningful manner," *Armstrong* v. *Manzo,* 380 U.S. 545, 552 (1965), "'for [a] hearing appropriate to the nature of the case,' *Mullane* v. *Central Hanover Tr. Co.,* [339 U.S. 306,] 313 [(1950)]," *Boddie* v. *Connecticut,* 401 U.S. 371, 378 (1971).[21] *Jenkins* v. *McKeithen,* 395 U.S. 411, 429 (1969)

[20] The court of appeals plainly read the Indiana decision to create an irrebutable presumption regarding the existence of injury. However, "permanent [and] irrebutable presumptions have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments." *Vlandis* v. *Kline*, 412 U.S. 441, 446 (1973). *See Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632 (1974); *Stanley* v. *Illinois*, 405 U.S. 645 (1972).

[21] This Court "traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts . . . as defendants hoping to protect their property . . . ." *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982). Insurers are afforded this protection. *Aetna Life Ins. Co.* v. *Lavoie*, 106 S.Ct. 1580 (1986).

("right to present evidence is . . . essential to . . . the Due Process Clause"). Where facts are deemed by law to be established against a litigant, the rights at stake are "fundamental in character." *Postal Telegraph Cable Co.* v. *City of Newport,* 247 U.S. 464, 476 (1918). Whatever flexibility may inhere in the form of procedure, *Hewitt* v. *Helms,* 459 U.S. 460, 472 (1983), the defendants' rights have obviously been violated when they are told that "no quantum of evidence" could be sufficient to prevent a judgment against them.

Finally, if the Indiana decision is read to establish substantive rules of law (as opposed to making findings of fact), then those rules are arbitrary and irrational on their face. *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.,* 438 U.S. 59, 83 (1978). The purported rules of decision are simply not logical. The factual predicate of ambiguity cannot be established without reference to the facts, and bodily injury cannot be found to exist where the evidence, if considered, would show none is present. Despite its rulings in this case, the court of appeals held not six weeks earlier that the very same bodily injury language was unambiguous; that "injury" was not an artificial legal concept but a contract term that required factual evidence of "real injury" during the policy period; that a multiple-trigger interpretation was "linguistically unsound" and unreasonable; and that summary judgment could not enter. *Abex Corp.* v. *Maryland Casualty Co.,* 790 F.2d at 124-27. That same court has now adopted and enforced the very result it held unreasonable. Neither the English language nor state substantive law is this infinitely malleable.

B. The Court Of Appeals Applied The Indiana Decision To Deprive Insurers Of Equal Protection Of The Laws.

State law determinations affecting insurers are subject to the equal protection requirements of the Fourteenth Amendment. *Metropolitan Life Insurance Co.* v. *Ward,* 105 S.Ct. 1676, 1681-82 (1985); *Home Insurance Co.* v. *Dick,* 281 U.S. 397, 407-08 (1930)

(Brandeis, J.). While states retain wide latitude to regulate economic affairs, they may not create a classification that "trammels fundamental personal rights" or is not "rationally related to a legitimate state interest." *City of New Orleans* v. *Dukes,* 427 U.S. 297, 303 (1976). Moreover, where the classification impinges the exercise of fundamental rights, such as the basic right to be heard on the decisive factual issues, then the classification is "presumptively invidious" and will be upheld only if "precisely tailored to serve a compelling governmental interest." *Plyler* v. *Doe,* 457 U.S. 202, 216-17 (1982); *accord Lyng* v. *Castillo,* 106 S.Ct. 2727, 2729-30 (1986); *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1, 18-44 (1973); *Shapiro* v. *Thompson,* 394 U.S. 618, 634 (1969)

The court of appeals held that insurers are fundamentally different from all other contracting parties, and that under Indiana law, insurance contracts are fundamentally different from all other contracts. Insurers are precluded from introducing evidence pertaining to the "factual predicate" of decision, because Indiana has a supervening policy to promote indemnity. App. A at 6a-10a. This policy compelled the rule that all evidence from the insurers should be excluded so that the insured could prevail.[22]

Many states, including Indiana, have a legitimate governmental objective in promoting indemnity from insurance contracts, but not in promoting indemnity by insurers regardless of the contract or the existence of compensable loss. Precluding insurers from showing the absence of bodily injury does not further a contractual indemnity, but furthers only an indemnity that is by definition unrelated to the contract's stated purpose. Thus, Indiana's discriminatory rule fails to satisfy even the minimum equal protection

[22] The Indiana decision spoke directly to this point:

"This objective of promoting coverage leads us to the conclusion that consideration of the [insurers'] extrinsic evidence is unnecessary to interpretation of the policies." App. B at 6b.

requirement that the state classification be "rationally related to legitimate governmental objectives." *Schweiker* v. *Wilson,* 450 U.S. 221, 230 (1980).

IV. THE COURT OF APPEALS INCORRECTLY HELD THAT THE PROPER TIME TO CHALLENGE THE CONSTITUTIONALITY OF STATE RULINGS IS BEFORE AN AUTHORITATIVE STATE LAW DECISION IS RENDERED.

Last Term this Court held that constitutional objections to a state supreme court decision, raised in rehearing papers and denied by court order, were duly preserved for review in this Court. *Aetna Life Insurance Co.* v. *Lavoie,* 106 S.Ct. 1580, 1584 (1986).[23] Precisely that situation was present here when the Indiana decision was returned to the court of appeals after certification, yet that court held the insurers' constitutional claims to have been waived. *See supra* pp. 7-9. This holding is flatly contrary to this Court's view of certification, and has far-reaching implications for future cases that potentially involve certification from an appellate court.

This Court has said, in the context of certification to a state court: "in the absence of an authoritative [state law] construction, it is impossible to define precisely the constitutional question presented." *Bellotti* v. *Baird,* 428 U.S. 132, 148 (1976).[24] Certification by definition involves *uncertainty* in the matters of state law upon which constitutional issues may be contingent, *Lehman*

[23] In *Lavoie* the Alabama Supreme Court's ruling on the merits consisted of an order denying the insurer's motions for disqualification, withdrawal of opinion, and hearing de novo. This Court held that the "order clearly demonstrates that the Alabama court reached the merits of appellant's constitutional challenge . . ." 106 S.Ct. at 1584.

[24] Where issues of both state and federal law are presented, the established rule is that the certifying court must reserve the federal issues for resolution in light of the state's answers. *Imel* v. *United States*, 523 F.2d 853, 857 (10th Cir. 1975); 17 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4248 at 529 (1978).

Brothers v. *Schein,* 416 U.S. at 390-91, and the answers represent the first authoritative construction of that state's law. Where the state's resolution of unsettled law itself presents constitutional questions, the certifying court must address them. *Sun Insurance Office Ltd.* v. *Clay,* 319 F.2d 505, 510 (5th Cir. 1963), *rev'd on other grounds,* 377 U.S. 179 (1964). None of those principles was followed here.

The court of appeals held that the insurers had not waived their constitutional rights in the district court because prior to that court's decision there was no "legal ruling focusing [these] issues." App. A at 11a n.13. Nonetheless, the court held a waiver did arise in pre-certification appellate proceedings because the subsequent "legal rulings" of the Indiana Supreme Court on unsettled state law were predicted "with some precision" by the district court's opinion. *Id.* at 11a. Thus, even though the court of appeals found itself "uncertain as to the validity of [the district court's] holdings" on Indiana law, App. C at 13c, and even though it received briefing on the constitutionality of Indiana's responses prior to ruling in this case, the court held the newly-adopted law of Indiana immune from constitutional challenge.

To imply a waiver of constitutional rights from a failure to levy constitutional challenges against "unsettled" and "uncertain" predictive statements of state law is surely wrong as a matter of principle.[25] This Court has held that where a state law is first

[25] It is also wrong on the facts of this case: the district court granted summary judgment, but it made no reference to "injury" having an "artificial legal meaning." Quite to the contrary, the district court referred repeatedly to the published sources about the etiology of DES and to "insidious diseases." App. D at 4d-5d & nn.3, 5 & 7, 11d n.14. Nor did the district court rule that the sole "factual predicate" for its decision was a finding of ambiguity. The district court said that it declined to inquire into extrinsic evidence because it would use basic principles governing the interpretation of insurance policies to give effect to the parties' reasonable expectations. *Id.* at 16d-17d. The bases on which Indiana law is now held to impose liability cannot be fairly derived from the district court's opinion.

authoritatively changed in state proceedings, a timely petition for rehearing preserves federal constitutional objections. *Missouri ex rel. Missouri Insurance Co.* v. *Gehner,* 281 U.S. 313, 320 (1930). *See also Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U.S. 673, 677-78 (1930); *Saunders* v. *Shaw,* 244 U.S. 317, 320 (1917). Indeed, under this Court's holding in *Lavoie, supra,* the insurers' petition to the Indiana Supreme Court for rehearing would have preserved their constitutional rights for direct appeal to this Court if the case had arisen in a state proceeding. That principle should not vary because the case, having arisen in the federal system, returns to the certifying court for decision: the federal appellate tribunal is in fact better situated to address constitutional objections because it has not yet reached a decision on the merits and has the benefit of settled state law "to define precisely the constitutional question presented." *Bellotti* v. *Baird,* 428 U.S. at 148.

The entire utility of certification proceedings turns on the ability to obtain such precise rulings of state law, and simple common sense dictates that briefing on the constitutional consequences of such rulings should occur after they have been made. The District of Columbia Circuit's rule of anticipatory waiver had never previously been imposed, and the useful practice of certification should not be burdened with special rules requiring the parties to brief in federal court contingencies of state law development before authoritative pronouncements by state courts.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

November 20, 1986

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APPENDICES

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

ELI LILLY AND COMPANY

v.

HOME INSURANCE COMPANY, *et al.*

Firemen's Fund Insurance Company, Appellant[1]

No. 84-5391.

June 24, 1986

Appeals from the United States District Court
for the District of Columbia.

Following Remand from the Supreme Court of Indiana
(D.C. Civil Action No. 82-669).

[1] Consolidated with the following cases (identified by this court's case number and appelant(s)), in all of which Eli Lilly & Company is the appellee: 84-5394, Zurich American Insurance Company; 84-5395, International Surplus Lines Insurance Company *et al.*; 84-5396, Interstate Fire & Casualty Company *et al.*; 84-5397, American Employers' Insurance Company; 84-5398, Falcon Insurance Company; 84-5399 Mutual Fire, Marine & Inland Insurance Company; 84-5400, St. Paul Fire & Marine Insurance Company; 84-5401, American Home Assurance Co. *et al.*; 84-5402, Insurance Company of North America *et al.*; 84-5403, American Motorists Insurance Company *et al.*; 84-5404, Aetna Casualty & Surety Company *et al.*; 84-5405, Allan Peter Denis Haycock and Paul Malcolm Johnson *et al.*; 84-5406, Home Insurance Company; and 84-5407, Travelers Indemnity Company.

Before EDWARDS and SCALIA, *Circuit Judges*, and WRIGHT, *Senior Circuit Judge.*[2]

Opinion for the court filed by *Senior Circuit Judge* WRIGHT.

J. SKELLY WRIGHT, *Senior Circuit Judge*: In *Eli Lilly & Co.* v. *Home Ins. Co.*, 764 F.2d 876 (D.C. Cir. 1985) (*Eli Lilly I*), this court certified several legal questions to the Supreme Court of Indiana concerning the scope of insurance coverage for the manufacturer of the drug DES. The Indiana court having issued an opinion answering our questions, the case is once again before us. The Indiana court held that under Indiana law extrinsic evidence would not be considered in construction of an ambiguous term in an insurance contract. *Eli Lilly & Co.* v. *Home Ins. Co.*, 482 N.E. 2d 467 (Ind. 1985). It further held that in the case of the contract before this court "coverage is triggered at any point between ingestion of DES and the manifestation of a DES-related disease." *Id.* at 470-471. These holdings dictate affirmance of the order of the District Court granting appellee's summary judgment motion on its declaratory claim.[3]

I. BACKGROUND

A. The DES Dispute

From the late 1940's until 1971 doctors often prescribed the drug DES (diethylstilbestrol) to pregnant women to help prevent miscarriages. In 1970, however, researchers reported a connection between ingestion of DES and development of cancers in the DES

[2] Judge Tamm, a member of the panel of this court that issued the certification decision, died before the Indiana Supreme Court remanded the case to this court. Judge Scalia was selected to replace Judge Tamm following the Indiana court's remand. Judge Wald subsequently recused herself and was replaced by Judge Edwards.

[3] In *Eli Lilly I* this court reserved decision on the personal jurisdiction and venue objections of three excess insurance companies. We now address these objections and find them without merit. *See* Part IV *infra*.

users' daughters who were *in utero* at the time the drug was taken. Massive tort litigation followed, much of it against appellee Eli Lilly, one of the largest manufacturers of DES.[4]

From the time it first produced DES until 1976 Eli Lilly purchased some 242 insurance policies to cover its DES risks. All of these policies provided that the insurer would indemnify Lilly for its tort liabilities if the underlying tort suit were based on an "injury" that occurred during the policy period.[5] The term "injury" is not defined with precision in the policies themselves. *See* 2 Joint Appendix (JA)96. Nor is the time at which injury "occurs" self-evident. Given that cancer often only develops when a DES daughter is between 15 and 25 years of age, Memorandum Opinion filed April 12, 1984 (Mem. Op.) at 4 n. * * * (D.D.C. Civil Action No. 82-669), 5 JA 697, it was not unusual for several insurance companies to have issued insurance policies to Lilly during the period between ingestion of DES and manifestation of the first diagnosable symptoms.

When Lilly notified its insurers of the DES claims filed against it, the insurers responded by adopting conflicting interpretations of the term "injury." *See Eli Lilly I*, 764 F.2d at 880. The general thrust of each insurance company's interpetation, however, was that some *other* insurance company was on the risk at the time the "injury" occurred. According to the District Court:

> In general, those insurers at risk prior to the diagnosis of DES-related diseases took the position that policies in force on the "date of manifestation" of the injury covered DES claims.

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[4] Lilly manufactured DES from 1947 to 1967. Over 600 lawsuits have been filed against Lilly for DES-related illnesses.

[5] There are four basic variants on the policy provision triggering liability. One of them refers to injuries "sustained" during the policy period. 2 Joint Appendix (JA) 97. The other three refer to injuries that "occur" during the policy period. 2 JA 96, 98, 99-100. As noted in *Eli Lilly I*, the parties do not contend that these differences require different interpretations. 764 F.2d at 879.

> Similarly, those insurers whose policies were in force on the date of manifestation of DES-related injuries took the position that policies in force on the date of ingestion of DES covered DES claims.
>
> Mem.Op. at 5n. * *, 5 JA 698.

By contrast, Lilly maintained that the policies should be governed by the "multiple trigger" theory: the injury should be understood to have "occurred" at any time between exposure to DES and manifestation of symptoms of a DES-related disease.

Lilly filed a declaratory judgment action in the District Court in March 1982. After extensive discovery, Lilly filed a motion for summary judgment in March 1983. Purporting to rely on Indiana law, the District Court granted Lilly's motion on April 12, 1984. The court held that (1) each insurer on the risk between the initial ingestion of DES and the manifestation of a DES-related disease is liable to Lilly for indemnification, (2) each insurer is liable in full once coverage under its policy is triggered, (3) Lilly can apply only one policy's limit to each injury, and (4) Lilly may select the policy under which it is to be indemnified (subject to the provisions in the policies governing allocation of liability when more than one policy covers an injury). *See* Mem. Op. at 22-23, 5 JA 715-716. The insurers appealed.

B. The Initial Appeal to This Court

On appeal the insurers argued that under Indiana law they should be allowed to introduce extrinsic evidence of the parties' actual intent in adopting the policies, their course of conduct in applying the policies, Lilly's sophistication and strength as a bargaining partner, and the etiology of DES-related illnesses. The insurance companies therefore argued that summary judgement had been improvidently granted because there were genuine factual disputes on three material issues: (1) the authorship of the policies, (2) the actual intent of the parties on the question of multiple trigger li-

ability, and (3) the views of medical experts on when injury actually "occurs."

In reviewing these challenges this court agreed with the District Court that the law of Indiana governs the case. A review of Indiana cases, however, suggested that the law of that state was unsettled on the question whether extrinsic evidence is admissible to construe an ambiguous trigger provision in an insurance contract and on the issue of which interpretation a court should adopt if it did not admit such extrinsic evidence. Consequently, in an opinion issued June 18, 1985 a divided panel of this court (Wright, Tamm,[6] and Wald) certified three questions of law to the Indiana Supreme Court.[7]

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[6] Judge Tamm would have applied this circuit's holding in *Keene Corp.* v. *Ins. Co. of North America*, 667 F.2d 1034 (D.C. Cir. 1981) *cert. denied*, 455 U.S. 1007, 102 S.Ct. 1644, 71 L.Ed.2d 875 (1982). Consequently, he opposed certification to the Indiana Supreme Court and filed a dissent.

[7] The three questions were:

1. Under Indiana insurance contract law, should the types of extrinsic evidence proffered by the insurers be considered in the interpretion of the disputed "trigger" provisions?

2. If any aspect of the insurers' extrinsic evidence should be considered, would Indiana courts require a determination of the parties' actual intent concerning the application of the "trigger" provision to delayed manifestation injuries? Or would Indiana courts permit a determination, after consideration of the extrinsic evidence, that the parties did not hold or convey a clear understanding of the trigger provision's applicability to delayed manifestation injuries and that, thus, the provision must be interpreted by the court as a matter of Indiana insurance law?

3. If the insurers' extrinsic evidence should not be considered, or if that evidence is not determinative of the parties' intent, how should the insurance policy provision at issue by interpreted under Indiana law? In other words, would Indiana courts adopt an exposure, a manifestation, a multiple trigger, or some other interpretation of the "injury"/"occurrence" language in Eli Lilly's policies? *Eli Lilly I*, 764 F.2d at 884-885.

C. The Indiana Decision

On September 12, 1985, the Supreme Court of Indiana issued its opinion responding to this court's certification. A petition for rehearing was denied on November 19, 1985, and the case was remanded to this court.

The Indiana court answered two of the three questions certified by this court. First, the Indiana court held that it would not consider extrinsic evidence to determine the meaning of the trigger provisions of Lilly's insurance.[8] The court grounded this rule against admitting extrinsic evidence on two alternative rationales. First, the court cited the policy of construing ambiguous policy language against the insurer. It hinted that this interpretive policy rested, in part, on the more general rule that construction should favor the non-drafter. 482 N.E.2d at 470. But the court also relied on the policy of construing ambiguous language in this manner because it "further[s] the policy's basic purpose of indemnity." *Id.* Finally, the Indiana court *partially* justified the policy of promoting indemnity on the basis of its tendency to conform with the "reasonable expectations" of the insured. *Id.*

The Indiana court also held that, given the trigger provisions involved in this litigation, the policies' "coverage is triggered at any point between ingestion of DES and the manifestation of a DES-related disease." *Id.* at 471 (the "multiple trigger" theory). The rationale for this rule was the same as the rationale for exclusion of extrinsic evidence: to further insurance policies' "dominant" purpose of providing indemnification. *See id.*

The only limitation the Indiana court imposed on the multiple trigger thesis was that the insurance policy must first be found to

[8] Having thereby answered this court's first question in this manner, the Indiana court saw no need to answer the second (*i.e.*, assuming that *some* extrinsic evidence was introduced, would Indiana courts require a determination of the parties' actual intent concerning the trigger provisions of the policies?).

be "ambiguous" before its special rules of construction will apply. *Id.* at 470. The court, however, specifically held the language of the policies covering Eli Lilly to be ambiguous.

Broadly stated, the insurers make three arguments as to why the Indiana opinion does not require this court to affirm the judgment of the District Court. First, appellants argue that, notwithstanding its seemingly clear holding, evidence of authorship, actual intent, and etiology is still admissible under the Indiana opinion. Second, and in the alternative, the insurers argue that if Indiana has established a rule of substantive law excluding evidence of authorship, intent, and etiology, the law is unconstitutional. Finally, a handful of the insurers argue that the District Court lacked personal jursidiction over them and that venue was not proper in the District of Columbia. We address these arguments *seriatim.*

II. ADMISSIBILITY OF EXTRINSIC EVIDENCE

A. Admissibility of Evidence of Authorship

Appellants contend that the Indiana court made evidence of authorship a material issue in construing insurance contracts. They read the Indiana opinion to make the insurer's authorship of a policy a necessary predicate of the general rule that ambiguities in such policies are to be construed against the insurer and, by implication, a necessary predicate of the court's conclusion that the multiple trigger interpretation should be applied here.

Appellants further argue that, although the Indiana court could determine the substantive law and thereby define the material issues in this case, that court could not determine what evidence was relevant to that issue. Issues of relevance, appellants correctly note, are to be determined under the Federal Rules of Evidence. Appellants therefore conclude that this court can and must ignore the Indiana court's statement that the insurers' evidence of authorship would be excluded under Indiana law. That ruling, they

argue, is a gratuitous statement of the Indiana law of evidence. Because appellants introduced evidence of Lilly's participation in drafting the trigger provision of at least some of the policies, they argue that summary judgment should not have been granted.[9]

The short answer to appellants' contentions is that the Indiana court did *not* make authorship a predicate of the general rules controlling the construction of insurance contracts or of its holdings in this case. As already noted, we read the Indiana court to have based the general rule that insurance contracts are to be construed against the insurer on three policies: assuring indemnification, fulfilling the reasonable expectations of the insured, and *contra proferentem.* 482 N.E.2d at 470. It is true that the rule that insurance contracts should be construed against the insurer is a predicate for the Indiana court's two holdings. And it is also true that the third rationale underlying this rule of interpretation — *contra proferentem* — does turn on authorship. Nonetheless, the Indiana opinion does not suggest that *each* of these rationales is a necessary predicate of the rule that a court should construe ambiguities against the insurer. The Indiana court's passing reference to the issue of authorship is therefore mere dicta.

B. Admissibility of Evidence of Actual Expectations

As with the Indiana court's reference to authorship, its statements concerning "expectations" merely elucidate one of the several policies underlying its holdings. As such, these statements are mere dicta. Moreover, the "expectations" of which the Indiana court speaks are the *objectively* reasonable expectations of

[9] The insurers argue that Lilly shared in the drafting and was responsible for the wording of several important policy provisions. *See* Joint Post-Certification Supplemental Memorandum of Defendants-Appellants filed Nov. 27, 1985 at 18. Lilly responds by arguing that, although it may have bargained for certain policy changes, it did not bargain in any substantive fashion over the terms of the trigger provision at issue in this case. *See* appellee's Post-Certification Supplemental Memorandum filed Dec. 10, 1985 at 16 n.1.

an insured. The Indiana opinion speaks of expectations that an insured "could" have had, not of the expectations it had in fact. *See id.*[10] It is also notable that the Indiana court referred to the principle of "reasonable expectations" in the context of explaining why it was going to construe insurance contracts against the insurer, as well as in the course of stating its rationale for adoption of the multiple trigger thesis. Thus, contrary to the contention of appellants, *see* Joint Post-Certification Supplemental Memorandum of Defendants-Appellants filed November 27, 1985 at 16, the Indiana court apparently did not think extrinsic evidence should be used to determine the character of such "reasonable expectations." Instead the court seemed to have determined the content of such expectations — the multiple trigger thesis — as a matter of law.[11]

C. Admissibility of Evidence of Etiology

The insurers argue that the Indiana court held that liability is triggered if diagnosable "injury" occurs at any point between ingestion and manifestation. They therefore argue that they had a right to introduce relevant evidence on the issue of when injury occurred.

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[10] The Indiana court adverted to such "reasonable expectations" by citing this court's opinion in *Keene Corp.* v. *Ins. Co. of North America*, *supra* note 6. In the passage in *Keene* cited by the Indiana court, this court defined "reasonable expectations" as those expectations that the insured "could have reasonably formed, as an *objective* matter, on the basis of the policies' language." 667 F.2d at 1042 n.12 (emphasis added).

[11] Thus in the hands of the Indiana court the concept of "objectively reasonable expectations" becomes a way of emphasizing one aspect of the policy of furthering indemnification: its assurance of certainty for the insured. Although this concept is susceptible of a variety of meanings, *see* Keeton, *Insurance Law Rights at Variance With Policy Provisions*, 83 HARV.L.REV. 961 (1970), the Indiana court's view is not an irrational application of that idea. Indeed, Professor (now Judge) Keeton has suggested that certain situation-specific evidence of actual intent or knowledge must be disregarded in construing the "objective" intentions of the insured. *See id.*, at 967, 974-975.

Appellants flaty misread the Indiana opinion. The Indiana court said that "*coverage* is triggered at any point between ingestion of DES and the manifestation of a DES-related disease." 482 N.E.2d at 471 (emphasis added). There is no requirement that diagnosable "injury" be shown during the time the insurer is on the risk.[12]

Appellants argue that when the Indiana court stated that "the determinative question * * * [is] when the DES-related 'injury' 'occurs' for purposes of the policies[,]" 482 N.E.2d at 469-470, it made the existence *vel non* of actual injury a material question in construing the trigger provision. Appellants fail to grasp the importance of the quotation marks around the terms "injury" and "occurs" in the Indiana court's formulation of the issue. By inserting the quotation marks the Indiana court plainly sought to signal that it understood those words to be terms of art that might well have a somewhat artificial legal meaning. If the Indiana court's phrasing of the "determinative question" is read in this manner, there is nothing surprising about its answer: coverage is triggered from the time of ingestion to the time of manifestation.

In sum, the only factual predicate of the rule that insurance contracts should be construed against the insurer is the requirement that the contract be ambiguous. Once that factual predicate was satisfied no quantum of evidence on the issues of authorship, intent, or etiology should have defeated a motion for summary judgment.

III. WAIVER OF CONSTITUTIONAL OBJECTIONS TO THE INDIANA OPINION

Appellee challenges appellants' efforts to attack the constitutionality of the Indiana opinion at this stage of the proceedings.

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[12] Ironically, the insurers seek to transform the Indiana opinion from an adoption of the *Keene* multiple trigger rule into the "injury in fact" view of *American Home Products Corp.* v. *Liberty Mutual Ins. Co.*, 565 F.Supp. 1485 (S.D.N.Y. 1983), *aff'd as modified*, 748 F.2d 760 (2d Cir. 1984). This court, however, certified this case to the Indiana court partially because it sought to clarify Indiana's view of the multiple trigger, injury in fact, manifestation, and exposure theories of liability.

Appellee argues that these arguments should have been presented in appellants' memoranda opposing appellee's motion for summary judgement in the District Court. Appellants contend that these issues were not ripe for resolution until the Indiana court provided a definitive statement of Indiana law. We do not find appellants' argument persuasive and hold that they waived their right to challenge the constitutionality of the Indiana opinion.

Once the District Court rendered its decision,[13] a constitutional attack on its construction of Indiana law was ripe for review. In its memorandum opinion granting appellee's motion for summary judgment the District Court determined that the law of Indiana governed this case. *See* Mem.Op. at 15, 5 JA 708. It also held that an Indiana court would not admit extrinsic evidence to construe this sort of ambiguous insurance contract, *see id.* at 20, 5 JA 713, and that an Indiana court would apply the *Keene* rule. *See id.* at 22, 5 JA 715. Thus all of the legal rulings that appellants find to be constitutionally offensive were stated with some precision in the District Court's memorandum opinion.

Appellants, however, failed to raise their constitutional arguments in their appeal to this court. *See* Joint Brief of Defendants-Appellants filed October 30, 1984. Nor did they bring these issues to the attention of the Indiana court before it rendered its decision. Instead, appellants raised their constitutional arguments for the

[13] Although Lilly's arguments in the District Court did foreshadow that court's ultimate basis of decision, *see* Statement of Points and Authorities in Support of Plaintiff Eli Lilly's Motion for Summary Judgment filed March 31, 1983, 2 JA 37-42, and although appellants failed to attack the constituionality of such a course in the District Court, *see* Statement of Points and Authorities in Opposition to Plaintiff's Motion for Summary Judgement filed May 31, 1983, 2 JA 683, 748-751; Joint Supplemental Memorandum of Defendants in Opposition to Plaintiff's Motion for Summary Judgment filed Aug. 31, 1983, 4 JA 108, appellants could reasonably have thought a constitutional challenge to the implications of Lilly's thesis would be premature until there was a legal ruling focusing the issues.

first time in their petition for rehearing to the Indiana Supreme Court.[14]

The rule in this circuit is that litigants must raise their claims on their initial appeal and not in subsequent hearings following a remand. *Laffey* v. *Northwest Airlines, Inc.*, 740 F.2d 1071, 1089-1092 (D.C. Cir. 1984), *cert. denied*, — U.S. —, 105 S.Ct. 939, 83 L.Ed.2d 951 (1985). This is a specific application of the general waiver rule, which bends only in "exceptional circumstances, where injustice might otherwise result." *District of Columbia* v. *Air Florida, Inc.*, 750 F.2d 1077, 1085 (D.C. Cir. 1984). There are no such circumstances in this case, and we see no need to create a blanket exception to the rule in *Laffey* and *Air Florida* for certification proceedings. We therefore find that appellants waived their constitutional claims by failing to raise them on their initial appeal to this court.

IV. PERSONAL JURISDICTION AND VENUE

Three of the appellant insurance companies contend that the District Court lacked personal jurisdiction over them and that venue in the District of Columbia was improper.[15] These appellants are all "excess" insurers: they provide supplemental coverage under roughly the same terms as Lilly's primary insurers. Appellee contends that these appellants effectively waived such personal jurisdiction and venue objections through consent to suit clauses in their insurance policies. Alternatively, appellee argues that jurisdiction and venue were properly exercised under the applicable statutes and the Due Process Clause. We examine these arguments *seriatim*.

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[14] *See* Joint Post-Certification Supplemental Memorandum of Defendants-Appellants, *supra* note 9, at 42.

[15] The three are Falcon Insurance Company, Interstate Indemnity Company, and Mutual Fire, Marine & Inland Insurance Company.

A. The Consent to Suit Clause

All three of these carriers[16] are bound by the following contractual provision:

> It is agreed that in the event of the failure of the Insurer(s) hereon to pay any amount claimed to be due hereunder, Insurer(s) hereon, at the request of the Insured, will submit to the jurisdiction of any Court of competent jurisdiction within the United States and will comply with all requirements necessary to give such Court jurisdiction and all matters arising hereunder shall be determined in accordance with the law and practice of such Court.

Mutual Fire Cover Note, CN 500528, 2 JA 670. *See also* 1 JA 183 (finding of the District Court that the consent to suit clause was adopted by reference by appellants Falcon and Interstate).

Appellants raise two arguments as to why this consent to suit clause does not eradicate their jurisdiction and venue objections. First, they argue that a court of "competent" jurisdiction must be a court that has *in personam* jurisdiction as well as subject matter jurisdiction. This argument largely reduces the consent to suit clause to a waiver of venue or *forum non conveniens*. As an initial matter, we find this reading hypertechnical, given that in many jurisdictions it is difficult to distinguish the outer perimeter of venue and *in personam* jurisdiction.[17] Moreover, by its terms

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[16] Interstate and Falcon are bound through the provision in their policies that makes them subject to the terms of the primary insurer's policy. Mutual's policy contains its own consent to suit clause that is identical to the provision reproduced in text.

[17] *Compare Du-Al Corp.* v. *Rudolph Beaver, Inc.*, 540 F.2d 1230, 1233 (4th Cir. 1976) (implicitly equating the two tests); *Houston Fearless Corp.* v. *Teter*, 318 F.2d 822, 826 (10th Cir. 1963) (expressly equating the two tests), *with Johnson Creative Arts, Inc.*, v. *Wool Masters, Inc.*, 743 F.2d 947, 954 (1st Cir. 1984) (finding that the outer limits of the "doing business" provision of the federal venue statute are defined by the dormant Commerce Clause, not the Due Process Clause). *See also* 15 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION § 3811 at 117-130 (1986) (criticizing the Commerce Clause test).

the clause requires the insured to do what is necessary to "give such Court jurisdiction," Although it is hardly clear just what that phrase means, it is certain that it does *not* refer to the collusive creation of subject matter jurisdiction. It therefore presumably refers to *in personan* jurisdiction and constitutes an implicit promise to consent to the exercise of such jurisdiction.

On the other hand, it would seem that if the term "competent" in the consent to suit clause is reduced to consent to subject matter jurisdiction, that term would be mere surplusage. Because parties could never "consent" to suit by a court that *lacked* subject matter jurisdiction, it must be assumed that *any* consent to suit would implicitly constitute consent to suit in a court that had subject matter jurisdiction. Under this reading the term "competent" would only be added to the consent to suit clause if the parties felt a need to specify that they had only consented to suit in courts that were already able to exercise personal jurisdiction over them.

Accepting that the term "competent jurisdiction" may be ambiguous in this context, we must construe that term in accordance with the Indiana law. As already noted, the general rule of construction in Indiana is that ambiguous terms in insurance contracts are to be construed against the insurer. Under this rule it would seem that the contractual waiver of jurisdictional objections should be read broadly to include waiver of personal jurisdiction as well as a waiver of any venue objections.[18]

Appellants' second argument is that this provision is only operative after presentation of a claim by the insured to an insurer and a default by the insurer on its obligations to the insured. Ap-

[18] We also note that the Indiana rule, announced in *Eli Lilly & Co.* v. *Home Ins. Co.*, 482 N.E.2d 467, 470 (Ind. 1985), that extrinsic evidence of actual intent is inadmissible applies to this issue. Therefore we have no occasion to remand the case for factual findings by the District Court on the parties' actual intent concerning the scope of the consent to suit clause.

pellants' obligations as excess insurers are not triggered until the primary policy limits have been exhausted. Because the primary insurers have failed to honor Lilly's claims during the pendency of this litigation, the excess insurers assert that they have not yet had occasion to default on their obligations and therefore that a condition precedent of their consent to suit has yet to be fulfilled.

Appellant Interstate, however, failed to raise the question of the condition precedent during the proceedings before the District Court.[19] It cannot raise it here at this late date. *See District of Columbia* v. *Air Florida, Inc.*, *supra*, 750 F.2d at 1084-1085. We therefore find the consent to suit clause fully operative as to appellant Interstate and affirm the District Court's order denying its motion to dismiss appellee's complaint for want of personal jurisdiction or venue.

Appellants Falcon and Mutual, however, did raise the issue of the condition precedent before the District Court.[20] Appellee argues that under the law of Indiana conditions precedent are waived by an "anticipatory breach," *i.e.*, by an insurer's repudiation of its liability under the policy. This is a correct statement of Indiana law. *See McNall* v. *Farmers Insurance Group*, 181 Ind. App. 501,

[19] Interestate failed to raise the issue in its arguments during the pendency of its motion to dismiss, *see* Memorandum of Law in Support of Motion to Dismiss by Defendant Interstate Indemnity Company, 1 JA 122-128; Reply of Interstate Indemnity Company to Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss, 1 JA 172-179. It is true that in its subsequent Answer to appellee's Complaint for Declaratory Judgment appellant Interstate did aver "a failure of conditions precedent to insurance *coverage* * * *." (Emphasis added.) This statement, listed as Interstate's "Seventh Defense," was not linked to Interstate's jurisdiction and venue objections (its "Fourth Defense"). If this general reference to "conditions precedent" was intended to amend the rather detailed arguments raised by Interstate on the jurisdictional issue, Interstate should have expressed this point with greater specificity.

[20] *See* Reply to Plaintiff's Opposition to Motions to Dismiss by Defendants Mutual Fire, Marine & Inland Insurance Company and Falcon Insurance Company at 4-6 (July 26, 1982).

392 N.E.2d 520, 523 (Ind. 1979); *Ohio Farmers Ins. Co.* v. *Vogel*, 166 Ind. 239, 76 N.E. 977, 978 (1906).[21] Unfortunately, the law of Indiana does not appear to define the term "anticipatory breach" with precision. Nor does it indicate whether anticipatory repudiation will waive *all* conditions precedent or only those conditions that remain in effect after the innocent party has substantially performed. But whatever the rule in Indiana, it appears that there was a failure of the condition precedent in the consent to suit clause as to appellant Mutual.

Prior to the District Court's ruling on the question of personal jurisdiction, Mutual had failed to take a specific position on the trigger provision of its policies.[22] Thus as to Mutual it is clear that there was no repudiation of liability. Although this may have generated some uncertainty for appellee Lilly, we cannot find that such uncertainty was enough to nullify a bargained-for condition precedent.

Appellant Falcon presents a harder case. Unlike Mutual, Falcon had adopted a specific view of the trigger clause: the manifestation

[21] Appellants rely on dicta in *China Union Lines* v. *American Marine Underwriters, Inc.*, 458 F.Supp. 132, 136 (S.D.N.Y. 1978), to the effect that a consent to suit clause is only triggered upon an actual default, not upon a mere anticipatory breach. The issue in *China Union* was whether a consent to suit clause constituted a waiver of an arbitration clause in the same contract. The court stated that it was not inclined to read the consent to suit clause as a waiver of the arbitration clause, in light of the strong federal policy favoring arbitration. *See* 9 U.S.C. § 4 (1982). Thus, although the *China Union* opinion does contain broad dicta on the inadequacy of anticipatory breach to trigger a consent to suit clause, such dicta is best read in light of the court's concern to accommodate a particular federal policy, a policy that is not applicable to this case. Moreover, the *China Union* court did not purport to construe the law of Indiana, the law that controls our construction of the insurance policy at hand and requires us to apply the rule that an anticipatory breach waives conditions precedent.

[22] *See* Defendant Mutual Fire, Marine & Inland Insurance Company's Response to Plaintiff's Third Set of Interrogatories, Answer to Inter-

theory.[23] Falcon issued policies to Lilly from 1960 to 1968. Lilly may still be seeking indemnification for claims based on illnesses that first became manifest before 1968, during the time Falcon would be liable to Lilly even under a manifestation theory. Thus on the facts before us it is simply not possible to determine whether Lilly might only present Falcon, as its excess insurer, with a set of claims that qualified under the manifestation theory.[24]

Ordinarily we would remand this issue for futher determinations by the District Court. But given the clear failure of the condition precedent as to appellant Mutual's consent to suit we must, in any event, reach the issue of whether due process allowed the District Court to exercise personal jurisdiction under the District of Columbia long arm statute. Because we find that personal jurisdiction was properly exercised under that statute, we find no need to consume additional judicial resources through a remand.

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rogatories Nos. 27-29 (June 2, 1983). Mutual merely stated that its interpretation "differs from that advanced by Lilly * * *." Given the variety of interpretive theories attending such contracts, the mere fact that an insurer might dispute the view of the insured would not, without more, automatically lead to the conclusion that the insurer had repudiated its obligations. Mutual may simply be maintaining a consistent litigation position here, knowing that it would ultimately have to pay Lilly, becuase it was intent on disputing its liabilities under similar trigger provisions included in other policies.

[23] *See* Defendant Falcon Insurance Company's Response to Plaintiff's Third Set of Interrogatories, Answer to Interrogatories Nos. 27-29 (June 2, 1983).

[24] We do not suggest that it is impossible or even unlikely that Falcon's position did effectively amount to a repudiation; we are simply unwilling to take that step absent more elaborate findings by the District Court on the likely effect of this position on Falcon's obligations. Although the District Court did find that the insurers had taken a position that "generally" would minimize their liability, *see* Mem. Op. at 5 n. * *, 5 JA 698, such a broad finding does not speak to the narrow question whether Falcon's adoption of the manifestation theory would necessarily have resulted in a repudiation of its obligations in this case.

B. D.C. Long Arm Statute and Due Process

The D.C. long arm statute, 13 D.C. Code § 423(a)(3) (1981 & 1985 Supp.), provides for jurisdiction over any person who contracts to insure any "risk * * * within the District of Columbia at the time of contracting." Appellee contends that the risk against which it insured here was the risk of liability arising from the use of its products, and that this risk existed wherever its products were used, including the District of Columbia. *See* supplemental brief of appellee filed December 13, 1984 at 15. We find appellee's reading of the D.C. long arm statute to be natural and persuasive. Although we must apply the D.C. long arm statute in this case, *see Gatewood* v. *Fiat, S.p.A.*, 617 F.2d 820, 822 n.3 (D.C. Cir. 1980), we can only apply that statute in a manner consistent with the Due Process Clause. *See Johnson Creative Arts, Inc.* v. *Wool Masters, Inc.*, 743 F.2d 947, 950 (1st Cir. 1984).

The touchstone of our due process inquiry is whether it would have been "foreseeable" that the excess insurers would be "haled into court" in the District of Columbia. *See World-Wide-VolkswagenCorp.* v. *Woodson*, 444 U.S. 286, 297, 100 S.Ct. 559, 567, 62 L.Ed.2d 490 (1980). Given the specific relationship between appellants and appellee in this case, we have little difficulty finding that such a result was in fact quite foreseeable.

Appellants knew that their insured, Lilly, distributed its products nationwide. They therefore were aware that *Lilly* was likely to be sued in any jurisdiction in the nation, including the District of Columbia. Moreover, as Lilly's insurers, appellants were aware that if Lilly was sued it was likely to attempt to implead appellants if a dispute arose over their duty to indemnify or defend. *Cf.*, *e.g.*, *Porter* v. *American Optical Corp.*, 641 F.2d 1128, 1131 (5th Cir.), *cert. denied*, 454 U.S. 1109, 102 S.Ct. 686, 70 L.Ed.2d 650 (1981) (asbestos manufacturer's insurers named as third-party defendants in products liability suit). In such an eventuality it would be completely foreseeable that the insured would successfully hale the insurance company into court.

The likelihood of impleader actions is not the sole reason for considering the contacts of the insured with a forum state in determining the foreseeability of an insurer being haled into court in that jurisdiction. Insurers must carefully gauge the riskiness of the products they insure. In determining the scope of the risk they have insured, insurers must consider the scale on which its insured has distributed a potentially dangerous product. The broader the distribution the greater the risk — and presumably the higher the premium. Thus insurers cannot be said to have failed to avail themselves, in a conscious and deliberate manner, of the benefits of doing business in those fora in which the insured manufacturer distributes its products. Moreover, an insurer has a commercial interest in knowing how, and to what degree, an insured manfuacturer has contacts with a forum state.

The commercial interest of the insurer in knowing of the contacts of its insured with the forum state provides the rationale for the First Circuit's rule that an insurer should foresee being sued in a jurisdiction where its insured has substantial contacts. Thus in *American & Foreign Ins. Ass'n* v. *Commercial Ins. Co.*, 575 F.2d 980, 982 (1st Cir. 1978), the court found that a products liability insurer was subject to personal jurisdiction where (1) the insured had shipped its products into the forum state, and (2) the terms of the policy "assured full knowledge of both the volume of export sales [and] the actual location of the customers." In *Commonwealth of Puerto Rico* v. *S.S. Zoe Colocotroni*, 628 F.2d 652, 669 (1st Cir. 1980), *cert. denied*, 450 U.S. 912, 101 S.Ct. 1350, 67 L.Ed.2d 336 (1981), the First Circuit indicated that the lack of an *explicit* understanding between the insurer and insured indicating that the insurer knew of the insured's contact with the forum state did not bar the exercise of *in personam* jurisdiction where the insurer plainly knew that the insured was likely to have substantial contacts with the forum. In this case there can be no question but that Eli Lilly's insurers were aware of the nation-wide scope of

Lilly's product distribution. They cannot now claim that it was somehow unforeseeable that they would be haled into court in a jurisdiction where Lilly would likely be subject to suit.[25]

C. Venue

Under 28 U.S.C. § 1391(c) (1982) venue is proper in any forum state where a corporation is "doing business." In *Noxell Corp.* v. *Firehouse No. 1 Bar-B-Que Restaurant*, 760 F.2d 312 (D.C. Cir. 1985), this court adopted this construction of the doing business test:

> "[D]oing business" in a district for the purposes of § 1391(c) [should be] read to mean engaging in transactions there to such an extent and of such a nature that the state in which the district is located *could* require the foreign corporation to qualify to "do business" there.

Id. at 316 n. 7 (*quoting Johnson Creative Arts*, *supra*, 743 F.2d at 954) (brackets & emphasis in original)).

[25] Appellants' situation is therefore distinguishable from that of the manufacturer in *Hughes* v. *A.H. Robins Co.*, 490 A.2d 1140, 1150-1151 (D.C.C.A. 1985). In that case the District of Columbia Court of Appeals found that due process was not satisfied where the manufacturer had only done substantial business within the forum on an intermittent basis and the cause of action did not arise from such contacts within the forum. *See also Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 U.S. 408, 413-415, 104 S.Ct. 1868, 1872-1873, 80 L.Ed.2d 404 (1984). Here the "contacts" of the insurers are much more substantial because they include the decision to insure a manufacturer that distributed products in the forum state. Even in non-insurance cases the activities of various middlemen may be relevant to an evaluation of the contacts of the defendant with the forum state. *See, e.g.*, *Coulter* v. *Sears, Roebuck & Co.*, 426 F.2d 1315, 1318 (5th Cir. 1970) (court could exercise personal jurisdiction over third-party defendant manufacturer where manufacturer sold products to Sears with knowledge that Sears would ship a substantial number to forum state). It is particularly appropriate, however, when evaluating the contacts of a products liability insurer with the forum state to consider its relationship with the insured and the insured's contacts with the forum state.

Consistent with this view, a corporation is "doing business" under Section 1391(c) whenever the Constitution would permit a state to require a foreign corporation to comply with a licensing scheme. *See Johnson Creative Arts, supra*, 743 F.2d at 954.

Appellants Mutual and Falcon both allocated premiums to policies sold in the District of Columbia.[26] Such policies were sold by independent brokers; neither appellant maintained an office in the District or had employees in the District. It is clear that the District of Columbia *could* impose such a burden on foreign excess insurers before independent brokers could sell their policies. Such practices are common in other jurisdictions without being upset by constitutional challenge.[27] *See, e.g.*, Md. Code Ann. Art. 48A, § 190 (1979 & 1985 Supp.). *See also* Schwing, *A Comparative Analysis of the Qualification Requirements Applicable to Alien Stock Insurers, to Surplus Line Insurers, and to Reinsurers*, INS.L.J. 649, 674-678 (November 1976). Thus it would seem that under the *Noxell/Johnson* test venue was proper in the District of Columbia.

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[26] *See* Affidavit of Paul D. Dooley (June 14, 1982) (for appellant Mutual), 1 JA 116-117; Affidavit of Ross C. Cowan (June 14, 1982) (for appellant Falcon), 1 JA 118-120. The record does not reveal any similar business contacts by appellant Interstate. But because we find that the consent to suit clause was fully operative against Interstate, we hold that Interstate effectively waived its venue objections as well as its personal jurisdiction objections.

[27] Indeed, the Supreme Court has read the passage of the McCarran-Ferguson Act, 59 STAT. 33, 15 U.S.C. § 1011 (1982), as a removal of all dormant Commerce Clause limitations on the power of the states to regulate insurance. *Western & Southern Life Ins. Co.* v. *State Board of Equalization*, 451 U.S. 648, 653-655, 101 S.Ct. 2070, 2075-2076, 68 L.Ed.2d 514 (1981).

V. CONCLUSION

Authorship, intent, and etiology are not material issues under Indiana law, and evidence bearing on such issues was rightly excluded. As the District Court held, any insurer on the risk between the time of ingestion and the manifestation of symptoms has a duty to indemnify appellee. The District Court's grant of appellee's motion for summary judgment is therefore affirmed. We also find the appellant excess insurers' personal jurisdiction and venue arguments to be ultimately unpersuasive. We therefore also affirm the District Court's order denying these appellants' motion to dismiss.

Affirmed.

APPENDIX B

Supreme Court of Indiana

ELI LILLY AND COMPANY, *Appellee,*

v.

The HOME INSURANCE COMPANY,
et al., Appellants.

No. 685S243.

Sept. 12, 1985

GIVAN, *Chief Justice*. This cause comes before this Court on the certification of three questions of state law by the United States Court of Appeals for the District of Columbia Circuit. *Eli Lilly and Co.* v. *Home Insurance Co.* (D.C. Cir. 1985), 764 F.2d 876. This Court has jurisdiction to answer the certified questions. Ind. R. App. P. 15(O).

On March 9, 1982, Eli Lilly and Company filed this declaratory judgment action in the United States District Court for the District of Columbia. Named as defendants were the various insurance companies that insured Lilly from 1947, when Lilly first manufactured and sold the drug diethylstilbestrol (DES), to 1976, when the insurers refused to insure DES risks. The suit involves the scope of products liability insurance coverage for claims arising from DES-related illnesses. *Id.* at 878. The basic dispute concerns what must happen during a particular policy period to invoke insurance coverage for that period, described by the insurers as the trigger of coverage.

From the late 1940's until 1971, DES was prescribed to pregnant women for the purpose of preventing spontaneous miscarriages. In 1970, researchers reported a significant statistical connection between ingestion of DES by pregnant women and the later development of vaginal clear-cell adenocarcinoma, vaginal adenosis and other reproductive tract disorders in daughters of DES users who were *in utero* at the time of the DES ingestion.

For a twenty-year period commencing in 1947, Lilly was one of the major manufacturers and sellers of DES. Lawsuits arising from DES-related illnesses began in 1972. At the time Lilly filed for summary judgment in this action, approximately 650 lawsuits had been filed against Lilly, and additional suits have since been filed.

On April 12, 1984, the District Court, in a memorandum opinion, granted Lilly's motion for summary judgment. The court determined that a conflict of laws existed and that Indiana law should govern. The court also determined that under Indiana law the extrinsic evidence offered by the insurers was not relevant in construing the insurance contracts. The court also held that the Indiana courts would follow *Keene Corp.* v. *Insurance Co. of North America* (D.C. Cir. 1981), 667 F.2d 1034, *cert. denied* (1982), 455 U.S. 1007, 102 S.Ct. 1644, 71 L.Ed.2d 875, and adopt a multiple trigger interpretation of the insurance contracts. Under the *Keene* approach, originally applied in the context of asbestos-related illnesses, each insurer on the risk at any time between the initial ingestion of DES and the subsequent manifestation of DES-related illness would be liable to Lilly for indemnification. *See Id.*, at 1041.

The insurers appealed that decision. While agreeing that Indiana law controls, the Court of Appeals found themselves "uncertain about the application of that law to the issues at hand," *Eli Lilly*, *supra* at 878, and certified the following questions to this Court:

"1. Under Indiana insurance contract law, should the types of extrinsic evidence proffered by the insurers be considered in the interpretation of the disputed 'trigger' provisions?

"2. If any aspect of the insurers' extrinsic evidence should be considered, would Indiana courts require a determination of the parties' actual intent concerning the application of the 'trigger' provision to delayed manifestation injuries? Or would Indiana courts permit a determination, after consideration of the extrinsic evidence, that the parties did not hold or convey a clear understanding of the trigger provision's applicability to delayed manifestation injuries and that, thus, the provision must be interpreted by the court as a matter of Indiana insurance law?

"3. If the insurers' extrinsic evidence should not be considered, or if that evidence is not determinative of the parties' intent, how should the insurance policy provision at issue be interpreted under Indiana law? In other words, would Indiana courts adopt an exposure, a manifestation, a multiple trigger, or some other interpretation of the 'injury'/'occurrence' language in Eli Lilly's policies?" *Id.* at 884-85.

The insurance policies at issue are "manuscript" policies written specifically for Lilly. The provision in each of the policies providing for liability coverage is, however, identical in all material respects to the coverage provision in the insurance industry's Comprehensive General Liability Policy (CGL). The CGL is a standard form policy for liability coverage adopted by the insurance industry in the 1960's to address the problem of insidious diseases which manifest after initial exposure to the substance believed to cause them.

The relevant clause in the majority of Lilly's policies defined coverage in terms of an "injury" that "occurs" during the policy period. Specifically, those policies provided that:

"[u]nderwriters hereby agree, subject to the limitations, terms and conditions hereafter mentioned, to indemnify the Assured for all sums which the Assured shall be obligated to pay . . . for damages, direct or consequential, and expenses, all as more fully defined by the term 'ultimate net loss,' on account of

> "(i) personal injuries, including death at any time resulting therefrom, . . . caused by or arising out of each occurrence anywhere in the world."

Thus the majority of Lilly's policies did not definitely state when an injury occurs in cases of insidious diseases. The parties do not contend that the relevant language in the remaining policies is significantly different.

As noted by the Court of Appeals, the policies did not define the relevant terms with precision. *Eli Lilly*, *supra* at 879. "Personal injury" was defined in part as "bodily injury, mental injury, mental anguish." "Occurrence" was defined as "an accident or a happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally results in personal injury . . . during the policy period." The Court of Appeals has defined its task to be interpreting those terms with respect to claims arising from DES-related illnesses, the determinative question being when the DES-related "injury" "occurs" for purposes of the policies. *Id.* at 879-80.

The first question is whether under Indiana law the insurers' extrinsic evidence should be used to interpret Lilly's policies. The District Court determined that the evidence was not necessary to its construction of the policy language. The court determined that in cases where the contract is one for insurance, Indiana courts will employ the basic principles governing the interpretation of insurance policies to give effect to the parties' reasonable expectations rather than conduct a searching inquiry into extrinsic evidence.

The insurers dispute the District Court's interpretation and argue that, under Indiana contract and insurance law, their proferred evidence should be considered. They contend the extrinsic evidence "is relevant to (1) the parties' intent in adopting the policies, (2) the parties' course of conduct in applying the policies, (3) Eli

Lilly's sophistication and strength as a bargaining partner, and (4) the medical nature of DES-related illnesses." *Id.* at 881.

Generally, in Indiana, contracts for insurance are subject to the same rules of interpretation as are other contracts. *Asbury* v. *Indiana Union Mutual Insurance Co.* (1982), Ind. App., 441 N.E.2d 232; *American Economy Insurance Co.* v. *Liggett* (1981), Ind. App., 426 N.E.2d 136. If the policy language is clear and unambiguous, it should be given its plain and ordinary meaning. *Spears* v. *Jackson* (1980), Ind. App., 398 N.E.2d 718; *Vernon Fire and Casualty Insurance Co.* v. *American Underwriters, Inc.* (1976), 171 Ind. App. 309, 356 N.E.2d 693. In order to apply the rules of construction favoring the non-drafter of insurance contract terms, the language must be ambiguous or of doubtful meaning. *Spears, supra.*

In determining when the DES-related "injury" "occurs" for purposes of the policies, at least two possible time considerations, exposure and manifestation, are relevant. *Eli Lilly, supra* at 880. Under Indiana law, an insurance policy is ambiguous if reasonable persons may honestly differ as to the meaning of the policy language. *Benefit Trust Life Insurance Co.* v. *Waggoner* (1985), Ind. App., 473 N.E.2d 646; *Huntington Mutual Insurance Co.* v. *Walker* (1979), 181 Ind. App. 618, 392 N.E.2d 1182. The language in Lilly's policies concerning what must happen during a particular policy period to trigger coverage for that period is ambiguous so as to be susceptible of more than one meaning.

The terms of an insurance policy should be interpreted most favorable to the insured if there is an ambiguity in the policy. *Miller* v. *Dilts* (1984), Ind. 463 N.E.2d 257; *State Security Life Insurance Co.* v. *Kintner* (1962), 243 Ind. 331, 185 N.E.2d 527. An ambiguous insurance policy should be construed to further the policy's basic purpose of indemnity. *Masonic Accident Insurance Co.* v. *Jackson* (1929), 200 Ind. 472, 164 N.E. 628; *American Economy, supra.*

In *Keene*, the court explicitly based its interpretation of the CGL-type policies on Keene's reasonable expectations on the basis of the policies' language. *Keene, supra* at 1042 n. 12. In the instant case, based on the relevant policy language, Lilly could have reasonably formed an expectation that it was purchasing insurance coverage for all future liability arising from the manufacturing and selling of DES. *See United Farm Bureau Mutual Insurance Co.* v. *Brantley* (1978), 176 Ind. App., 178, 375 N.E.2d 235.

Ambiguous insurance policy language should be interpreted to further the policy's purpose of indemnity. The language should be strictly construed against the insurer. *Miller, supra*; *State Security, supra*. This objective of promoting coverage leads us to the conclusion that consideration of the extrinsic evidence is unnecessary to intepretation of the policies. We therefore hold that under Indiana insurance law the insurers' proferred evidence would not be considered.

Our disposition on that question obviates the need to answer the second certified question. We would note that the construction of the ambiguous policy language should be resolved by the court as a matter of law. *See, e.g., Ohio Casualty Insurance Co.* v. *Ramsey* (1982), Ind. App., 439 N.E.2d 1162; *Huntington, supra*.

We now address the question of how the insurance policy provision at issue should be interpreted under Indiana law. As correctly noted by both federal courts in the instant case, no Indiana state court or federal court applying Indiana law has interpreted the policy langugage in the delayed manifestation context.

In the context of asbestos-related illnesses, the courts are divided in their interpretation of CGL-type policy provisions to determine the trigger of coverage. Some courts have adopted an exposure theory. *Porter* v. *American Optical Corp.* (5th Cir. 1981), 641 F.2d 1128, *cert. denied*, 454 U.S. 1109, 102 S.Ct. 686, 70

L.Ed.2d 650; *Insurance Co. of North America* v. *Forty-Eight Insulations, Inc.* (6th Cir. 1980), 633 F.2d 1212, *cert. denied* (1981), 454 U.S. 1109, 102 S.Ct. 686, 70 L.Ed.2d 650. At least one court has adopted a manifestation theory. *Eagle-Picher Industries, Inc.* v. *Liberty Mutual Insurance Co.* (1st Cir. 1982), 682 F.2d 12, *cert. denied* (1983), 460 U.S. 1028, 103 S.Ct. 1279, 75 L.Ed.2d 500. The *Keene* multiple trigger approach has been adopted by the Third Circuit, following the multiple trigger approach of lower Pennsylvania courts. *ACandS, Inc.* v. *Aetna Casualty and Surety Co.* (3rd Cir. 1985), 764 F.2d 968. *See Vale Chemical Co.* v. *Hartford Accident and Indemnity Co.* (1985), 340 Pa.Super. 510, 490 A.2d 896.

Under the multiple trigger theory, each insurer on the risk between the ingestion of DES and the manifestation of a DES-related illness is liable to the insured for indemnification. *See Keene, supra* at 1047.

In order to achieve the objectives in Indiana law, of giving effect to the policies' dominant purpose of indemnity, we hold that coverage is triggered at any point between ingestion of DES and the manifestation of a DES-related disease. This holding comports with the rule of interpretation that the courts should strive to give effect to the reasonable expectations of the insured. We therefore adopt the multiple trigger interpretation of the "injury"/"occurrence" language in Lilly's policies.

This cause is remanded to the United States Court of Appeals for the District of Columbia Circuit for further proceedings.

DeBRULER, PRENTICE and PIVARNIK, JJ., concur.

HUNTER and SHEPARD, JJ., not particpating.

IN THE

Supreme Court of Indiana

ELI LILLY AND COMPANY,
Plaintiff-Appellee,
v.
THE HOME INSURANCE COMPANY, *et al.*,
Defendants-Appellants.

Cause No. 685 S 243

ORDER

GRANTING "MOTION FOR LEAVE TO FILE PETITION FOR REHEARING AND RELATED PAPERS"
and
DENYING "OPPOSITION OF ELI LILLY AND COMPANY TO DEFENDANTS-APPELLANTS' MOTION FOR LEAVE TO FILE PETITION FOR REHEARING AND RELATED PAPERS".

COME NOW Appellants, the Home Insurance Company, et al., and files its "Motion for Leave to File Petition for Rehearing and Related Papers".

COMES ALSO Appellee, Eli Lilly and Company, and files its "Opposition of Eli Lilly and Company to Defendants-Appellants' Motion for Leave to File Petition for Rehearing and Related Papers".

THIS COURT FINDS that Appellants anticipated an opposition to filing their petition for rehearing based upon the fact that a rehearing petition was stricken in the case of *Gabhart* v. *Gabhart* (1977), 267 Ind. 370, 370 N.E.2d 345. Appellants pointed out that this Court considered and *denied* a rehearing petition, presumably on the merits, in *Daque* v. *Piper Aircraft Corp.* (1981), 275 Ind. 520, 418 N.E.2d 287. Thus, it is argued that the "Petition for Rehearing" in this case should also be reviewed on its merits. Appellants' anticipation was born out, inasmuch as Appellee filed its "Opposition of Eli Lilly and Company to Defendants-Appellants' Motion for Leave To File Petition for Rehearing and Related Papers", citing *Gabhart, supra.*

THIS COURT, BEING DULY ADVISED IN THE PREMISES, finds that

1. A.R.15(0) neither provides for nor prohibits petitions for rehearing.

2. A.R.11(B) allows for rehearing in "any cause".

3. A.R.15(O) makes references to a certified question case as a cause.

In light of the above, and in light of this Court's policy to consider questions on the merits when possible, this Court now GRANTS Appellants' "Motion for Leave to File Petition for Rehearing and Related Papers", and DENIES Appellee's "Opposition of Eli Lilly and Company to Defendants-Appellants' Motion for Leave to File Petition for Rehearing and Related Papers". *See e.g., State* v. *Heslar* (1972), 257 Ind. 625, 277 N.E.2d 796.

The Clerk of this Court is directed to send a copy of this Order to all counsel of Record.

DONE AT INDIANAPOLIS, INDIANA this 7 day of October, 1985.

/s/ _____
RICHARD M. GIVAN
Chief Justice of Indiana

FILED
Oct. 7, 1985
/s/ Marjorie H. O'Laughlin
Clerk of the
Indiana Supreme and
Court of Appeals

STATE OF INDIANA

Clerk of the Supreme Court
and Court of Appeals

No. 685 S 243

Eli Lilly and Company -v- *The Home Insurance Company, et al.*

You are hereby notified that the Supreme Court has on this day

Appellant's petition for Rehearing Denied. Givan, C.J. Shepard, J., not participating.

Appellant's Petition for Oral Argument DENIED. Givan, C.J.

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court, this 19th day of November, 1985.

/s/ Marjorie H. O'Laughlin
Clerk Supreme Court and
Court of Appeals

APPENDIX C

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

ELI LILLY AND COMPANY

v.

HOME INSURANCE COMPANY, et al.
Fireman's Fund Insurance Company, Appellant.

ELI LILLY AND COMPANY

v.

HOME INSURANCE COMPANY, et al.
Zurich American Insurance Company, Appellant.

ELI LILLY AND COMPANY

v.

HOME INSURANCE COMPANY, et al.
International Surplus Lines Insurance Company, et al., Appellants.

ELI LILLY AND COMPANY

v.

HOME INSURANCE COMPANY, et al.
Interstate Fire and Casualty Company, et al., Appellants.

ELI LILLY AND COMPANY

v.

HOME INSURANCE COMPANY, et al.
American Employers' Insurance Company, Appellant.

ELI LILLY AND COMPANY

v.

HOME INSURANCE COMPANY, et al.
Falcon Insurance Company, Appellant.

ELI LILLY AND COMPANY

v.

HOME INSURANCE COMPANY, et al.
Mutual Fire, Marine and Inland
Insurance Company, Appellant.

ELI LILLY AND COMPANY

v.

HOME INSURANCE COMPANY, et al.
St. Paul Fire and Marine Insurance Company, Appellant.

ELI LILLY AND COMPANY

v.

HOME INSURANCE COMPANY, et al.
American Home Assurance Co., et al., Appellants.

ELI LILLY AND COMPANY

v.

HOME INSURANCE COMPANY, et. al.
Insurance Company of North America, et al., Appellants.

ELI LILLY AND COMPANY

v.

HOME INSURANCE COMPANY, et al.
American Motorists Insurance Company, et al., Appellants.

ELI LILLY AND COMPANY

v.

HOME INSURANCE COMPANY, et al.
Aetna Casualty and Surety Company, et al., Appellants.

ELI LILLY AND COMPANY

v.

HOME INSURANCE COMPANY, et al.
Allan Peter Denis Haycock and
Paul Malcolm Johnson, et al., Appellants.

ELI LILLY AND COMPANY

v.

HOME INSURANCE COMPANY, Appellant,
Insurance Company of North America, et al.

ELI LILLY AND COMPANY

v.

HOME INSURANCE COMPANY, et al.
Travelers Indemnity Company, Appellant.

Nos. 84-5391
and
84-5394 to
84-5407

Argued May 13, 1985.

Decided June 18, 1985.

Appeals from the United States District Court
for the District of Columbia
(D.C. Civil Action No. 82-669).

Before WRIGHT, TAMM and WALD, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* J. SKELLY WRIGHT.

Dissenting statement filed by *Circuit Judge* TAMM.

J. SKELLY WRIGHT, *Circuit Judge*: We review a grant of summary judgment in favor of Eli Lilly and Company in its declaratory judgment suit against various insurance companies. Eli Lilly's suit concerns the scope of coverage for claims arising from the company's manufacture and sale of the drug DES (diethylstilbestrol). The District Court determined that Indiana law controlled this diversity action and granted summary judgment for Eli Lilly on the basis of its interpretation of Indiana law. The insurance companies appeal.

We agree with the District Court that Indiana law controls. However, we find ourselves uncertain about the application of that law to the issues at hand. Importantly, Indiana law provides a procedure by which uncertain questions of state law may be certified from federal appellate courts to the Indiana Supreme Court. Ind.R.App.P 15(0) (1985). The use of such certification procedures lies within the discretion of the federal courts. *Lehman Brothers* v. *Schein*, 416 U.S. 386, 391, 94 S.Ct. 1741, 1744, 40 L.Ed.2d 215 (1974). We now exercise that discretion and certify the issues to the Indiana Supreme Court for resolution.[1]

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[1] Three insurance companies raise personal jurisdiction and venue objections. Since the vast majority of the defendants do not raise these claims, we will reserve them for our final resolution after our receipt of the Indiana Supreme Court's response to this certification.

I

A.

The sad tale of DES continues to unfold. Hailed as a boon for women with a risk of miscarriages, DES was prescribed to pregnant women from the late 1940's until 1971. In 1970, however, researchers reported a significant connection between (1) ingestion of DES by pregnant women and (2) later development of vaginal clear-cell adenocarcinoma and other diseases in those daughters of the DES users who were *in utero* at the time of the DES ingestion. As DES daughters increasingly discovered what they thought were DES-related illnesses, they filed lawsuits against DES manufacturers. The complexities of liability for DES-related illnesses have presented courts with difficult, challenging questions, *see, e.g., Sindell* v. *Abbott Laboratories,* 26 Cal.3d 588, 163 Cal.Rptr. 132, 607 P.2d 924 (Cal.), *cert. denied,* 449 U.S. 912, 101 S.Ct. 285, 66 L.Ed.2d 140 (1980), and massive DES litigation continues to loom as people who believe they are DES victims seek a measure of compensation and redress in courts of law.[2]

B.

From 1947 to 1967, Eli Lilly was one of the major manufacturers and sellers of DES. As a result, more than six hundred lawsuits have already been filed against Eli Lilly for DES-related illnesses.

On March 9, 1982, Eli Lilly brought this declaratory judgment action against the various insurance companies that insured it from

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[2] In addition to the emergence of vaginal clear-cell adenocarcinoma in DES daughters, a wide range of other medical problems is also believed to be linked to DES exposure, including breast cancer in DES mothers and testicular cancer in DES sons. *See* Pub.L. No.99-28, 99th Cong., 1st Sess. (April 25, 1985).

the time it first manufactured DES (1947) to the time insurance companies finally refused to insure DES risks (1976).

The declaratory judgment turns on the interpretation of Eli Lilly's insurance policies. During the 29 years at issue, Eli Lilly was covered by some 242 insurance policies. The relevant clause of the policies appears in four slightly different versions. Three of the four versions define coverage in terms of an "injury" that "occurs" during the policy period. 2 Joint Appendix (JA) 96, 98, 99-100. The fourth version--reflected in 21 of the policies--refers to injuries "sustained" during the policy period. 2 JA 97. No party contends that these slight differences require different interpretations. *See* Joint Brief of Appellants-Defendants at 8-9; Brief of Appellee at 8-9. Furthermore, the "injury"/"occurrence" formulation is, in all material respects, identical to the insurance industry's Comprehensive General Liability Policy (CGL) provision that has been in effect since the 1960's.

The policies do not define the relevant terms with precision. For instance, in 199 of the 242 policies the insurance companies agreed to insure Eli Lilly for "personal injuries * * * caused by or arising out of each occurrence anywhere in the world." 2 JA 96. "Personal injury" was defined in part, and not altogether helpfully, as "bodily injury, mental injury, mental anguish." *Id.* "Occurrence" was defined in turn, as "an accident or a happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally results in personal injury . . . during the policy period." *Id.* at 96-97. Our task is to interpret these terms with respect to claims arising from DES-related illnesses.

C.

The determinative question is when the DES-related "injury" "occurs" for purposes of the policy. At least two possible time pegs are relevant: (1) the time of *exposure* (when the DES mother

ingested the DES), and (2) the time of *manifestation* (when the DES daughter discovered her illness). The insurance companies vigorously disagree as to *which* of these times should be relevant, but they have put that dispute aside for the present. Their argument in the current proceeding is that only one of those time pegs--exposure or manifestation--can be relevant; they will fight out later which one is relevant. Eli Lilly, in contrast, argues that the policies should be governed by what some courts have called the *multiple trigger* theory: the injury should be understood to have "occurred" at exposure, manifestation, and the period between the two while the disease was latent.

Courts have split in deciding how to interpret this insurance policy provision for illnesses in which there is a delay between exposure and manifestation. In the context of asbestosis, which results from exposure to asbestos, courts have split three ways. The Fifth and Sixth Circuits have held that state courts would adopt an "exposure" theory. *See Porter* v. *American Optical Corp.*, 641 F.2d 1128 (5th Cir.), *cert. denied,* 454 U.S. 1109, 102 S.Ct. 686, 70 L.Ed.2d. 650 (1981) (citing Louisiana law); *Insurance Co. of North America* v. *Forty-Eight Insulations, Inc.,* 633 F.2d 1212 (6th Cir. 1980), *cert. denied,* 454 U.S. 1109, 102 S.Ct. 686, 70 L.Ed. 2d 650 (1981) (citing Illinois and New Jersey law). The First Circuit has held that state courts would adopt a "manifestation" theory. *See Eagle-Picher Industries, Inc.* v. *Liberty Mutual Insurance Co.,* 682 F.2d. 12 (1st Cir. 1982), *cert. denied,* 460 U.S. 1028, 103 S.Ct. 1279, 75 L.Ed.2d. 500 (1983) (citing Illinois and Ohio law). Finally, the District of Columbia Circuit has held that several states would adopt a "multiple trigger" theory, *see Keene Corp.* v. *Insurance Co. of North America,* 667 F.2d. 1034 (D.C. Cir. 1981), *cert. denied,* 455 U.S. 1007, 102 S.Ct. 1644, 71 L.Ed.2d. 875 (1982) (citing "basic principles" shared by Delaware, New York, the District of Columbia, Pennsylvania, Connecticut, and Massachusetts), and the Pennsylvania courts have themselves adopted a multiple trigger theory, *see Crown*

Cork & Seal Co. v. *Aetna Casualty & Surety Co.*, No. 1292 September Term (Philadelphia Court of Common Pleas, Aug. 2, 1983).

Other delayed manifestation illnesses have also produced differences in judicial interpretation of the CGL-type "trigger" provision. The Fifth Circuit has tentatively extended its exposure holding to silicosis. *See Ducre* v. *Executive Officers of Halter Marine, Inc.*, 752 F.2d 976 (5th Cir. 1985). Similarly, the Pennsylvania courts have extended their multiple trigger holding to DES-related illnesses. *See Vale Chemical Co.* v. *Hartford Accident & Indemnity Co.*, --Pa.Super.--, 490 A.2d. 896 (1985), *petition docketed,* No. 491 E.D. Allocatur Docket 1985 (Pa. April 22, 1985) (*reproduced in* Joint Supplemental Filing of Certain Defendants-Appellants as Appendix 1.)

The status of the law in some other jurisdictions is less clear. In New York one state court has held that manifestation triggers coverage for DES-related illnesses, but that court did not explicitly reject the possibility that other triggers might exist as well. *American Motorists Insurance Co.* v. *E.R. Squibb & Sons, Inc.*, 95 Misc.2d 222, 406 N.Y.S.2d. 658 (Sup.Ct.1978). Applying New York law, however, the Second Circuit has rejected the multiple trigger theory and adopted an "injury in fact" interpretation. *See American Home Products Corp.* v. *Liberty Mutual Insurance Co.*, 565 F.Supp. 1485 (S.D.N.Y.1983), *aff'd as modified,* 748 F.2d 760 (2d Cir.1984). In other cases the Second Circuit has suggested that, under New York law, no determination can be made until an extensive consideration of extrinsic evidence is completed. *See, e.g., Schering Corp.* v. *Home Insurance Co.*, 712 F.2d 4 (2d Cir.1983); *cf. Emons Industries* v. *Liberty Mutual Fire Insurance Co.*, 567 F.Supp. 335 (S.D.N.Y.1983). The Wisconsin Supreme Court, moreover, finding differences in the insurance contracts before it, held that ingestion (exposure) and market participation triggered coverage for policies until 1968, and an "injury" triggered coverage for policies after 1968. *See Kremers-Urban Co.*

v. *American Employers Insurance Co.*, 119 Wis.2d 722, 351 N.W.2d. 156 (1984).

Thus, in the context of delayed manifestation illnesses, three prinicipal interpretations have emerged: exposure, manifestation, and multiple trigger. In addition, some courts have considered "injury in fact" theories, and some have seemed to suggest that interpretation of this insurance policy provision must be extremely contextual.[3]

D.

In the proceedings below the District Court granted summary judgment to Eli Lilly and interpreted the insurance policy provisions to provide multiple trigger coverage. The court determined, first, that a conflict of laws existed, and that Indiana law should govern. The court determined, second, that, under Indiana law, extrinsic evidence is not relevant in construing insurance contracts. As a result, concluded the court, under the Federal Rules there was no genuine issue of material fact precluding summary judgment. *See* Fed.R.Civ.P.56(c). Finally, noting that the interpretation of the provision at issue has not been decided in Indiana, the court held that the Indiana courts would adopt a multiple trigger interpretation because that interpretation would best effectuate Indiana's principle of construing ambiguities in favor of the insured and giving force to the insured's reasonable expectations.

The insurance companies appeal. They vigorously argue that, in construing the insurance policies at issue, Indiana courts would consider extrinsic evidence. The companies have submitted ex-

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[3] We note also that at least one commentator has suggested that traditional contract doctrine is inadequate for interpreting this insurance company policy provision in the context of delayed manifestation illnesses. *See* Note, *Asbestos Insurance Liability: Alternatives to Contract Analysis*, 97 HARV.L.REV. 739 (1984).

trinisic evidence which, they claim, is relevant to (1) the parties' intent in adopting the polices, (2) the parties' course of conduct in applying the policies, (3) Eli Lilly's sophistication and strength as a bargaining partner, and (4) the medical nature of DES-related illnesses. Since this extrinsic evidence should be considered under Indiana's contract and insurance law, the insurance companies argue, there is a genuine issue of material fact under the Federal Rules, and the summary judgment should be reversed.[4]

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[4] More specifically, the insurance companies argue, first, that extrinsic evidence on intent, including correspondence from Eli Lilly, would establish that the parties' intent was to provide single trigger coverage; as noted, the insurance companies would then disagree among themselves about the precise nature of that single trigger. Second, the insurance companies contend that extrinsic evidence of conduct during the policies, including the treatment of other delayed manifestation incidents, would establish the parties' understanding that the policies provided single trigger coverage; again, however, they would disagree about the identity of the single trigger that was so understood. Third, the insurance companies maintain that extrinsic evidence of Eli Lilly's financial strength and sophistication would establish that doctrines derived from contracts of adhesion and unequal bargaining power are inapplicable. And, fourth, the insurance companies claim that extrinsic medical evidence about DES-related illnesses would establish that the illnesses "occur" at a single, specified time; yet again, the insurance companies would ultimately disagree about the identification of that time.

In addition to arguing that Indiana courts would not consider this evidence because of the principle of effectuating the objectively reasonable expectations of the insured, Eli Lilly contends that, even if the extrinsic evidence is considered, it could only establish that the parties did not consider how the trigger language should be applied to delayed manifestation injuries, or that the parties' intent concerning that language was ambiguous. Because the extrinsic evidence could only demonstrate ambiguity, Eli Lilly contends, the ambiguous provision must be construed, as a matter of law, in favor of the insured.

II

A.

We must first determine whether the District Court correctly determined that Indiana law should be applied.

In a diversity case a federal court must apply the choice of law principles of the jurisdiction in which it sits. *Klaxon Co.* v. *Stentor Electric Mfg. Co.,* 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941). Under District of Columbia principles, we must first determine whether there is a conflict between the laws of the relevant jurisdictions. *Fowler* v. *A & A Co.,* 262 A.2d 344, 348 (D.C.1970); *Gaither* v. *Myers,* 404 F.2d 216, 222 (D.C.Cir.1968). As the District Court observed, at least three states would have an interest in applying their substantive law. Indiana has an interest: Eli Lilly's principal place of business and place of incorporation are in Indiana, and many of the policies were negotiated and concluded there. New York and Pennsylvania also have an interest: along with Indiana, those are the principal states where the policies were negotiated and concluded. Furthermore, as the District Court also found, there is a conflict between at least two of the relevant jurisdictions. Pennsylvania has adopted a multiple trigger theory for interpreting the CGL-like trigger provision, *see Vale, supra,* but New York apparently has not, *see American Home Products Corp., supra.*

Since there is a conflict, we must determine which jurisdiction has the "more substantial interest," *DeMontmorin* v. *DuPont,* 484 A.2d 582, 585 (D.C.1984); *Blair* v. *Prudential Insurance Co.,* 472 F.2d 1356, 1359 (D.C. Cir.1972). Indiana, Pennsylvania, and New York have similar interests with respect to their role as the site of contract negotiation and agreement. Indiana, however, has a strong additional interest because it is Eli Lilly's principal place of business and place of incorporation. Apparently, no appreciable difference emerges in the location of the insurance

companies and of the potential Eli Lilly DES victims; no such differences have been argued, and our review of the record reveals none. In light of these circumstances, we agree with the District Court that Indiana law should govern.

The insurance companies do not dispute the holding that Indiana law should govern. In addition to its arguments that the District Court's interpretation of Indiana law was correct, however, Eli Lilly argues, in the alternative, that Indiana law should not control.

Eli Lilly offers two reasons for this alternative argument. First, it argues that there is no "real" conflict in the jurisdictions at issue--or in any jurisdiction--because the holdings of all jurisdictions have ultimately given coverage to the insured. While we agree that construing ambiguities in insurance contracts in favor of the insured is a venerable and important policy in most, if not all, jurisdictions, we do not agree with Eli Lilly's apparent proposition that the complexities of state law are therefore irrelevant. We note that federal and state courts have grappled with this issue, and we are not prepared to say that those efforts were merely gyrations toward a preordained result. Eli Lilly claims that none of the holdings is inconsistent with a multiple trigger theory. The short answer is that various courts have specifically rejected a multiple trigger theory. *See, e.g., American Home Products, supra.*

Second, Eli Lilly argues that this court is bound by our prior holding in *Keene.* Eli Lilly contends that *Keene* rested on "general principles of insurance contract interpretation" and that "the basic principles governing the interpretation of insurance policies under Indiana law are the same as those in most states and the same as those stated in *Keene.*" Brief of Appellee at 26-27. However, this argument tends to ignore the fact that our mission here is to interpret and apply state law. *Erie Railroad Co.* v. *Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed.2d 1188 (1938). In *Keene,* it is

true, this court did not particularly dwell on the nuances of state law. Rather, we observed that the multiple trigger theory reflected "basic principles" of contract law and that we saw no reason to believe that the six jurisdictions which might have an interest differed on these general principles. *See Keene, supra,* 667 F.2d at 1041 n. 10. Since *Keene,* however, it has become clear that not all states share the view expressed in *Keene* -- or at least not all federal courts interpreting the laws of state jurisdictions do so. *See American Home Products, supra*; *Eagle-Picher, supra.* The interpretation of the "trigger" provision at issue must, then, be rooted in Indiana law; Keene is relevant only insofar as we determine that the Indiana courts would adopt it.[5]

B.

Having determined that Indiana law governs, we must now determine the substance of that law. As noted previously, the District Court's holding rested on three determinations: (1) under Indiana law, extrinsic evidence should not be considered in interpreting this type of insurance policy provision; (2) since extrinsic evidence should not be considered, there is no genuine issue of material fact; and (3) under Indiana's principle of construing ambiguities in favor of the insured, the Indiana courts would adopt a multiple trigger analysis for DES-related illnesses, as the Pennsylvania courts and this court have done for asbestosis, and as the Pennsylvania courts have done for DES-related illnesses.

Our review of Indiana law leaves us uncertain as to the validity of these holdings. On the one hand, Indiana courts have sometimes

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[5] Eli Lilly also claims that, under a contractual provision, it can designate the choice of law. However, as the insurance companies point out, Eli Lilly did not advance this argument before the District Court, and we will not consider its possible validity on appeal. *See District of Columbia* v. *Air Florida, Inc.,* 750 F.2d 1077, 1084 (D.C.Cir.1984)("It is well settled that issues and legal theories not asserted at the District Court level ordinarily will not be heard on appeal.").

interpreted insurance policy provisions without any reference to extrinsic evidence. *See, e.g., Mutual Hospital Insurance* v. *Klapper,* 153 Ind. App. 555, 288 N.E.2d 279, 281-282 (1972), *transfer denied,* 262 Ind. 144, 312 N.E.2d 482 (1974) (interpreting meaning of term in Indiana insurance policies without any reference to extrinsic evidence). On the other hand, however, some Indiana courts have emphasized that insurance contracts should be interpreted like other contracts, *see, e.g., Asbury* v. *Indiana Union Mutual Insurance Co.,* 441 N.E.2d 232, 236 (Ind. App. 1982), and, at least in other contexts, Indiana courts have permitted introduction of extrinsic evidence to resolve contractual ambiguities. *See, e.g., Goeke* v. *Merchants National Bank & Trust Co.,* 467 N.E.2d 760, 765 (Ind.App. 1st Dist.1984).

Additionally, some Indiana courts have emphasized that the question of extrinsic evidence turns on whether the ambiguity is facial (sometimes called "patent") or contextual (sometimes called "latent"). *See, e.g., Michigan Mutual Insurance Co.* v. *Combs,* 446 N.E.2d 1001 (Ind.App. 1983); *Churchwell* v. *Firestone Industrial Products Co.,* 431 N.E.2d 853, 854 (Ind. App. 2d Dist.1982); *Huntington Mutual Insurance Co.* v. *Walker,* 392 N.E.2d 1182, 1185 (Ind. App. 1st Dist.1979). However, as one Indiana court has pointed out, that principal has been abandoned in many jurisdictions, *Hauck* v. *Second National Bank of Richmond,* 153 Ind.App. 245, 286 N.E.2d 852, 862 (2d Dist.1972), and the Indiana Supreme Court has not addressed the distinction for many years. *Id.*

Furthermore, although the Indiana Supreme Court has emphasized that "[t]he terms of an insurance policy should be construed liberally in favor of the insured * * if there is an ambiguity in the policy's language," *Miller* v. *Dilts,* 463 N.E.2d 257, 265 (Ind.1984); *See also State Security Life Insurance* v. *Kintner,* 243 Ind. 331, 185 N.E.2d 527 (1962), we have not found an Indiana Supreme Court decision that settles the question of how extrinsic

evidence should be used in that analysis, if at all, and the parties have pointed us to none.

Thus, we find ourselves uncertain on an important point of Indiana law. The State of Indiana provides a procedure for federal appellate courts to certify uncertain questions of state law to the Indiana Supreme Court, Ind.R.App.P. 15(0),[6] and the Seventh Circuit has used this procedure on several occasions, *see, e.g., Metropolitan Life Insurance Co.* v. *Tallent,* 445 N.E.2d 990 (Ind.1983); *Gabhart* v. *Gabhart,* 267 Ind. 370, 370 N.E.2d 345 (1977). *See also Walko Corp.* v. *Burger Chef Systems, Inc.,* 554 F.2d 1165 (D.C.Cir.1977)(certifying question to Maryland Court of Appeals).

The United States Supreme Court has stressed the propriety of certification if the state law is uncertain. *See Lehman Brothers* v. *Schein,* supra, 416 U.S. at 391, 94 S.Ct. at 1744 (certification of uncertain questions "does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism"); *Clay* v. *Sun Insurance Office Limited,* 363 U.S. 207, 212, 80 S.Ct. 1222, 1225, 4 L.Ed.2d 1170 (1960)(Florida statute "which permits a federal court to certify * * * a doubtful question of state law" is an example of "rare foresight"). *See also Elkins* v. *Moreno,* 435 U.S. 647, 98 S.Ct. 1338, 55 L.Ed.2d 614 (1978)

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[6] The rule provides:

(0) Certification of questions of state law from federal courts. When it shall appear to the Supreme Court of the United States, to any circuit court of appeals of the United States, or to the court of appeals of the District of Columbia, that there are involved in any proceeding before it questions or propositions of the law of this state, which are determinative of the said cause, and there are no clear controlling precedents in the decisions of the Supreme Court of this state, such federal appellate court may certify such questions or propositions of the laws of this state to the Supreme Court of this state for instructions concerning such questions or propositions of state law which certificate the Supreme Court of this state, by written opinion, may answer.

(certifying question to Maryland Court of Appeals); *Bellotti* v. *Baird,* 428 U.S. 132, 96 S.Ct. 2857, 49 L.Ed.2d 844 (1976) (certifying question to Supreme Judicial Court of Massachusetts). The Supreme Court has emphasized, moreover, that the use of certification "in a given case rests in the sound discretion of the federal court." *Lehman Brothers, supra,* 416 U.S. at 391, 94 S.Ct. at 1744.

We think this an appropriate case to exercise our discretion to certify. In addition to the uncertainty of state law, two other factors weigh in our analysis. First, this case is one of extreme public importance. As noted, the State of Indiana has a very substantial interest in this dispute. We point out an example that illustrates the stakes of this dispute. Since the insurance companies refused to issue insurance for DES-related illnesses after 1976, if a manifestation theory is adopted Eli Lilly will have no coverage for claims arising from diseases that "manifest" after 1976. Although firm figures are impossible at this point, Eli Lilly's counsel estimates that Eli Lilly would thus have no coverage for at least a third of the claims arising from its manufacture and sale of DES. The outcome of the insurance dispute, of course, affects not only the pharmaceutical company and insurance companies before us, but also the potential DES victims. Given the magnitude of the public interest, we feel it especially important to be certain that we do not misapply the governing law.

Second, we note that Eli Lilly has suggested only one reason for its decision to bring suit in this forum: the *Keene* precedent. Since Indiana law controls, however, *Keene* is relevant only insofar as it would be persuasive to Indiana courts. In view of the fact that different jurisdictions have reached differing results on the interpretation of this "trigger" provision, we think it appropriate to seek guidance form the Indiana Supreme Court on this question of first impression in Indiana law.

Taken together, these factors convince us that certification is an appropriate exercise of our discretion. We thus certify the following questions to the Indiana Supreme Court:

1. Under Indiana insurance contract law, should the types of extrinsic evidence proffered by the insurers be considered in the interpretation of the disputed "trigger" provisions?

2. If any aspect of the insurers' extrinsic evidence should be considered, would Indiana courts require a determination of the parties' actual intent concerning the application of the "trigger" provision to delayed manifestation injuries? Or would Indiana courts permit a determination, after consideration of the extrinsic evidence, that the parties did not hold or convey a clear understanding of the trigger provision's applicability to delayed manifestation injuries and that, thus, the provision must be interpreted by the court as a matter of Indiana insurance law?

3. If the insurers' extrinsic evidence should not be considered, or if that evidence is not determinative of the parties' intent, how should the insurance policy provision at issue be interpreted under Indiana law? In other words, would Indiana courts adopt an exposure, a manifestation, a multiple trigger, or some other interpretation of the "injury"/"occurrence" language in Eli Lilly's policies?

This court's opinion, together with copies of the briefs and of the record submitted on appeal, are transmitted herewith to the Indiana Supreme Court.

So ordered.

TAMM, *Circuit Judge,* dissenting: Certifying these issues to the Indiana Supreme Court is needlessly time consuming. In my view, the district court correctly found that *Keene Corp.* v. *Insurance Co. of North America,* 667 F.2d 1034 (D.C. Cir.1981), *cert. denied,* 455 U.S. 1007, 102 S.Ct. 1644, 71 L.Ed.2d 875

(1982), controls the resolution of this dispute. I therefore respectfully dissent.

APPENDIX D

United States District Court

FOR THE DISTRICT OF COLUMBIA

ELI LILLY AND COMPANY,
Plaintiff,
v.
THE HOME INSURANCE COMPANY, *et al.*,
Defendants.

Civil Action No. 82-0669

ORDER

Upon consideration of the motion of plaintiff for summary judgment, the joint opposition of defendants, the supplemental opposition of defendants Insurance Company of North America, California Union Insurance Company, and Horace Mann Insurance Company, the argument of counsel, and the entire record in these proceedings, it is this 12th day of April, 1984,

ORDERED that the motion of plaintiff for summary judgment be, and hereby is, GRANTED.

/s/ _____
NORMA HOLLOWAY JOHNSON
United States District Judge

FILED
April 12, 1984
JAMES F. DAVEY, Clerk

United States District Court

FOR THE DISTRICT OF COLUMBIA

ELI LILLY AND COMPANY,
Plaintiff,
v.
THE HOME INSURANCE COMPANY, *et al.*,
Defendants.

} Civil Action No. 82-0669

ORDER

Upon consideration of Defendants' April 23, 1984 Joint Motion for Amendment of the Court's April 12, 1984 Order, the memoranda filed in support thereof and in opposition thereto, and the Court having heard oral argument, it is this 30th day of May, 1984

ORDERED that this Court's April 12, 1984 Order is amended by adding thereto the following paragraph:

> "ORDERED that this Order does not adjudicate any defense that may be available to any defendant relating to ultimate indemnification, or payment of costs to defend, or duty to defend."

/s/ _____
NORMA HOLLOWAY JOHNSON
United States District Judge

FILED
May 30, 1984
JAMES F. DAVEY, Clerk

United States District Court

FOR THE DISTRICT OF COLUMBIA

ELI LILLY AND COMPANY,
Plaintiff,
v.
THE HOME INSURANCE COMPANY, *et al.*,
Defendants.

Civil Action No. 82-0669

MEMORANDUM OPINION

Plaintiff Eli Lilly and Company moves this Court for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure (Fed. R. Civ. P.). Defendants, Lilly's insurers from 1947 to July 15, 1976, vigorously oppose the motion. For the reasons set forth in this Opinion, the Court finds that there is no genuine issue as to any material fact and Lilly is entitled to judgment as a matter of law. Accordingly, the motion of plaintiff for summary judgment is granted.

BACKGROUND

Eli Lilly is one of several hundred manufacturers of products containing the drug diethylstilbestrol (DES).[1] Between 1947 and 1967, Lilly manufactured and sold DES for prescription use by women with a history of threatened or habitual miscarriages.[2] In

[1] DES, the first synthetic estrogen, was synthesized in 1938 by Dr. E.C. Dodds and his colleagues at Oxford and Cambridge, England. In 1941, the Food and Drug Administration (FDA) approved Lilly's New Drug Application for DES for certain nonpregnancy indications.

[2] FDA permitted Lilly to market DES as a prescription drug for the treatment of threatened or habitual miscarriage in September 1947. In 1952, FDA informed Lilly that DES was "no longer a new drug" within

1970, a statistical association was shown between the ingestion of DES by pregnant women and the occurrence of vaginal clear-cell adenocarcinoma in the female offspring exposed *in utero* to DES.[3] Since the discovery of this association, Lilly's liability for clear-cell adenocarcinoma and other DES-related diseases has become the subject of voluminous litigation. Indeed, as of March 1, 1983, approximately 641 lawsuits had been filed against Lilly.[4]

In the typical case, the plaintiff, a DES-daughter, alleges that her mother ingested DES during pregnancy and her *in utero* exposure to DES caused a DES-related injury. The most common injuries alleged by plaintiffs are vaginal or cervical clear-cell adenocarcinoma and vaginal adenosis.[5] Lilly also has been named

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the meaning of the Federal Food, Drug, and Cosmetic Act § 102(a), 21 U.S.C. § 321(p) (1982). A drug is "no longer a new drug" under the Act when it is generally recognized by experts in the field as safe and effective for its intended purpose. *Id.*; *see also Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609 (1973); *United States* v. *An Article of Drug Entrol-C Medicated*, 513 F.2d 1127 (9th Cir. 1975).

[3] Drs. Arthur L. Herbst and Robert E. Scully first reported the statistical association. *See* Herbst & Scully, *Adenocarcinoma of the Vagina in Adolescence: A Report of 7 Cases Including 6 Clear Cell Carcinomas (so-called mesonephromas)*, 25 CANCER 745-57 (1970). Since the Herbst and Scully Report, other researchers have reported correlations between the ingestion of DES during pregnancy and the appearance years later of abnormalities in the male or female child of that pregnancy. *See, e.g.*, Stafl & Mattingly, *Vaginal adenosis: A Precancerous Lesion?*, 120 AM. J. OBSTET. GYNECOL. 666-73 (1974). In 1971, FDA required pharmaceutical manufacturers to contra-indicate DES for use in treating certain complications of pregnancy.

[4] 362 of these suits were pending as of March 31, 1983.

[5] Adenosis, a noncancerous condition, is the presence of normal columnar cells in an unusual location in the vagina. *See generally*, Johnson, Driscoll, Hertig, Cole, & Nickerson, *Vaginal Adenosis in Stillborns and Neonates Exposed to Diethylstilbestral and Steroidal Estrogens and Progestins*, 53 J. AM. COLLEGE OBSTET. & GYNECOL. 971 (1979). Other abnormalities allegedly caused by *in utero* exposure to DES are infertility, cervical ectropion, and transverse vaginal and cervical ridges.

as a co-defendant with other manufacturers of DES in cases where a plaintiff is unable to identify the manufacturer of the particular synthetic estrogen that allegedly caused the injury.[6] These cases are not uncommon since several years elapse between the ingestion of DES by a pregnant woman and the diagnosis of a DES-related disease in the male or female child of that pregnancy.[7]

Lilly notified defendants of the various DES claims filed against it.[8] The general position of each of the insurers is, however, that its policy does not provide coverage for these claims since the proper date of the alleged DES-related injury did not occur during the policy period.[9] In this action for declaratory judgment, Lilly seeks a judgment declaring that 1) each policy in force from the date of ingestion of DES until the manifestation of an alleged DES-related injury provides full coverage to Lilly for the entire amount of its indemnifiable losses and expenses, subject only to those underlying dollar limits of liability contained in each policy; 2) Lilly may elect under which of the policies in force it will file each claim; 3) the insurer which issued the policy that Lilly elects

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[6] Plaintiffs in such cases have proceeded on theories which would impose liability on Lilly even though it cannot be established that a Lilly product was ingested. Several jurisdictions have recognized these novel theories of tort liability. *See, e.g., Siddell* v. *Abbott Laboratories*, 607 P.2d 924 (Cal. 1980).

[7] For example, current medical research indicates that the clear-cell adenocarcinoma allegedly caused by *in utero* exposure to DES usually develops when the female offspring is between 15 and 25 years of age.

[8] Defendants refused to write further insurance to Lilly for DES-related losses on July 15, 1976.

[9] In general, those insurers at risk prior to the diagnosis of DES-related diseases took the position that policies in force on the "date of manifestation" of the injury covered DES claims. Similarly, those insurers whose policies were in force on the date of manifestation of DES-related injuries took the position that policies in force on the date of ingestion of DES covered DES claims.

must pay the full amount of Lilly's indemnifiable losses and expenses with prejudgment interest as permitted by law; and 4) the participation or contribution by other insurers whose policies are in force during the period of coverage shall be the responsibility of the insurers and shall not impede or detract from Lilly's ability to receive indemnification.

The Policies

Lilly's product liability insurance policies with defendants are "manuscript" policies written specifically for Lilly.[10] However, the provision in each of these policies providing for liability coverage is identical in all material respects to the coverage provision in the Comprehensive General Liability Policy (CGL). The CGL is a standard form policy for liability coverage drafted during the 1960's by representatives of the insurance industry to deal with the problem of liability for insidious diseases; that is, illnesses which become manifest long after initial exposure to the substance believed to cause them.[11] Both the 1966 version of the CGL and

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[10] In each year Lilly's insurance begins after an initial level of loss or liability for which Lilly is self-insured. This self-insured amount is generally referred to as a self-insured retention or SIR. Above the SIR amount is an initial layer of insurance which insures Lilly against losses in excess of the SIR up to the policies' stated limit of liability. In most years, additional layers of insurance insure Lilly against losses in excess of the limits of the initial layer policies. Each layer of insurance covers losses in excess of the amounts covered by the preceding layers up to a maximum liability limit after which another layer is triggered.

[11] Prior to 1966, general liability policies provided coverage for liability "because of bodily injury, sickness or disease, including death at anytime resulting therefrom, sustained by any person, *caused by accident* and arising out of the hazards . . . ." *See American Home Products Corp.* v. *Liberty Mutual Insurance Co.*, 565 F. Supp. 1485, 1501, *citing* 1 R. LONG, LAW OF LIABILITY INSURANCE § 11.01 at 11-4 (1979) (emphasis added). Since the word "accident" suggested an intent to cover liability for injuries sustained by reason of sudden, unexpected, but identifiable events, courts were faced with the question of whether, and to what extent, did the standard policy cover liability for injuries resulting from gradual processes. The insurance industry responded with the CGL which sub-

Lilly's policies throughout the period relevant to this litigation provide liability coverage for "occurrences" that result in personal injury. The coverage language in 199 of the 254 policies issued to Lilly is representative. It provides that the

> [u]nderwriters hereby agree, subject to the limitations, terms and conditions hereafter mentioned, to indemnify the Assured for all sums which the Assured shall be obligated to pay . . . for damages, direct or consequential, and expenses, all as more fully defined by the term "ultimate net loss," on account of
>
> > (i) personal injuries, including death at any time resulting therefrom, . . . caused by or arising out of each occurrence anywhere in the world.

"Personal injuries" is defined as "bodily injury, mental injury, . . . sickness, [or] disease", and "occurrence" is defined as "an accident or a happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally results in personal injury . . . during the policy period." It is clear that each policy, like the CGL, requires that an "injury", and not the "occurrence" which causes the injury, falls within a policy period in order for coverage to trigger. It is, however, unclear under both the CGL language and Lilly's policies when injury occurs. Thus, the ultimate question before this Court is when does "bodily injury, sickness or disease" occur under the liability coverage provision of the policies purchased by Lilly.

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stitutes the "accident" approach with the "occurrence" approach that provides coverage for any injury or damage resulting from both accidents and long-term injurious exposure. The new CGL did not, however, state definitively when injury occurs in cases of insidious diseases. *Id.*

DISCUSSION

Choice of Law

The basis for jurisdiction in this case is diversity of citizenship, 28 U.S.C. § 1332(a) (1982 ed.). Thus, it is rudimentary that state law furnishes the substantive rules of decision. *See, e.g., Erie Railroad Co.* v. *Tompkin*, 304 U.S. 64 (1938). This case, however, has factual contacts with more than one state. Eli Lilly is incorporated in Indiana and maintains its principal place of business in Indianapolis, Indiana. Each of the defendants is either a corporation with citizenship in a state other than Indiana and with its principal place of business outside Indiana, a foreign corporation with its principal place of business outside Indiana, or an individual alien.[12] More importantly, the insurance policies which are the subject of this litigation were negotiated primarily by mail and telephone between plaintiff's employees and its agent Marsh-McClennan and Associates, in Indianapolis, New York, Chicago, Toronto, Montreal, and London and representatives of defendants located largely in the eastern United States and Europe.

When confronted with a multi-state case, a court must make a twofold inquiry. First, a court must ascertain whether more than one state has an interest in applying its law to the facts at issue. Second, a court must consider whether the laws of the interested states conflict when applied to the particular dispute. If this question is answered in the affirmative, a court is faced with a classic conflict-of-laws issue and it must then determine what law governs the disposition of the case. Courts will not engage in this choice-of-law exercise, however, when the laws of interested states do not conflict or present what is commonly referred to as a "false conflict."[13] *See, e.g., Keene Corp.* v. *Insurance Co. of North*

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[12] Stipulation, filed March 21, 1983, ¶ 2; Stipulation Substituting Certain London Defendants, docketed July 20, 1982, ¶ 1; Answer of Allan Peter Denis Haycock, et al., docketed July 20, 1982, ¶ 5.

[13] A false conflict is present when either the laws of the interested states are the same or when these laws, though different, produce the same result

America, 667 F.2d 1034, 1041 n.10 (D.C. Cir. 1981), *citing Waters* v. *American Automobile Ins. Co.*, 363 F.2d 684, 687 (D.C. Cir. 1966) *and Williams* v. *Rawlings Truck Line, Inc.*, 357 F.2d 581, 585 (D.C. Cir. 1965).

It is clear that more than one state has an interest in applying its laws governing the interpretation of insurance policies to the coverage provisions of Lilly's policies. For example, Indiana, Pennsylvania, and New York have an obvious interest as the principal states where the parties negotiated and agreed on the terms of the insurance policies. *See* Affidavit of D.C. Arbogast attached to Plaintiff's Opposition to Defendants' Motion to Dismiss or Transfer; Defendants' Appendix VI, Ex. 828. Further, Indiana has a particular interest in the construction of the coverage provisions since the insured's domicile is Indiana. Thus, the Court must now determine whether the interpretative laws of these states conflict when employed to construe CGL-type coverage terms in cases of insidious diseases, such as DES-related illnesses.

The courts in the interested states which have addressed this issue all begin their analysis by applying the general principles of interpretation of insurance contracts to CGL coverage terms. Although these principles do not differ in any material respect, these courts have derived different constructions of when coverage is triggered in insidious disease claims. Courts in the Second Circuit, applying New York law, and New York courts have largely construed coverage for DES-related claims to trigger when the disease becomes manifest; that is, when the symptoms of the injury become noticeable or diagnosable. *See Emons Industries, Inc.* v. *Liberty Mutual Fire Ins. Co.*, 567 F. Supp. 335 (S.D.N.Y. 1983); *American Home Products Corp.* v. *Liberty Mutual Insurance Co.*, 565 F. Supp. 1485, 1493 (S.D.N.Y. 1983); *quoting American Motorists Insurance Co.* v. *E.R. Squibb & Sons, Inc.*, 406 N.Y.S.2d

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when applied to the facts at issue. *See generally*, Comment, *False Conflicts*, 55 CALIF. L. REV. 74, 89 (1967).

658 (Sup. Ct. 1978). While federal and state courts in Pennsylvania have not yet construed the coverage of liability for DES-related claims, these courts have determined that coverage for asbestos-related injuries, insidious diseases like DES-related diseases, is triggered at exposure, exposure in residence, and manifestation. *See, e.g., Crown, Cork & Seal Co., Inc.* v. *Aetna Casualty & Surety Co., et al.*, No. 1292 (Pa. D. & C. Aug. 21, 1983) (adopting the theory of "multi-trigger coverage" espoused in *Keene Corp.* v. *Insurance Co. of North America*, 667 F.2d 1034 (D.C. Cir. 1981)).

The U.S. District Court in New York and the state courts of New York have, however, rejected *Keene's* construction of these CGL-type coverage provisions. In *Emons Industries*, 567 F. Supp. 335, the Court refused to adopt *Keene's* multi-trigger construction of when injury occurs under these provisions on the following grounds: 1) New York law may be at variance with *Keene* since at least one New York state court adopted the manifestation construction of coverage in DES-related lawsuits; 2) the Second Circuit on numerous occasions has applied the manifestation theory to insidious diseases; and 3) New York courts are less likely to "vary the contract of insurance to accomplish its notions of abstract justice . . . ." *Id.* at 339. It is apparent that New York and Pennsylvania courts give different meanings to the term "injury" as used in a CGL-type coverage clause. Indeed, a court which defines the term "injury" as a noticeable or diagnosable disease in the case of DES-related claims will reach a very different decision than a court which determines that an injury is present from initial exposure to the ultimate manifestation of a DES-related disease.[14] Thus, this conflict between the interpretative laws of

[14] In suits involving asbestos-related diseases, however, a false conflict exists since the different interpretative laws employed by the courts reach the same result, namely coverage for the insured. *See, e.g., Eagle-Picher Industries, Inc.* v. *Liberty Mutual Insurance Co.*, 523 F. Supp. 110 (D. Mass 1981), *modified*, 682 F.2d 12, 17-20 (1st Cir. 1982) (manifestation);

New York and Pennsylvania in the case of DES-related injuries is neither illusory nor false, and this Court is faced with the classic choice-of-law issue.

To determine what law governs the disposition of a multi-state case, federal courts are obligated to apply the choice of law principles of the forum jurisdiction. *See Walton* v. *Morgan Stanley & Co., Inc.*, 623 F.2d 796 (2d Cir.1980); *Perdue* v. *J.C. Penney Co., Inc.*, 470 F. Supp. 1234 (D.C.N.Y. 1979); *Thompson* v. *Yue*, 426 F. Supp. 853 (D.C.N.J. 1977); *Philadelphia Facilities Management Corp.* v. *Saint Paul Fire & Marine Insurance Co.*, 379 F. Supp. 780 (D.C. Pa. 1974). Under the choice-of-law rules of the District of Columbia, the substantive law of the state which has the "more substantial interest" in the resolution of the issues must be applied to the case. *See Lee* v. *Flintkote Co.*, 593 F.2d 1275, 1279 n.16 (D.C. Cir. 1979); *Clayman* v. *Goodman Properties, Inc.*, 518 F.2d 1026, 1030 n.22 (D.C. Cir. 1973); *Fowler* v. *A & A Company*, 262 A.2d 344 (D.C. 1970); *Stevens* v. *American Service Mutual Insurance Co.*, 234 A.2d 305, 309 (D.C. 1967). The "more substantial interest" test is not a mechanical standard and courts must ascertain the quality of the contacts which invoke a state's interest in a particular case. Courts should also

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Insurance Co. of North America v. *Forty-Eight Insulations, Inc.*, 633 F.2d 1212, 1223 (6th Cir. 1980) (exposure), *reh'g granted in part and denied in part*, 657 F. 2d 814 (1981), *cert. denied*, 454 U.S. 409 (1981); *Keene* v. *Insurance Co. of North America*, 667 F.2d 1034, 1041 (D.C. Cir. 1981) (exposure thru manifestation), *cert. denied*, 455 U.S. 1007 (1982). This "false conflict" is created in asbestos-related claims by the reliance of certain courts on etiological evidence of when asbestos-related injuries become noticeable or diagnosable. Current etiological studies of DES-related diseases indicate, however, that, unlike asbestos-related injuries, DES injuries do not have any identifiable precursors or symptoms. As a result, courts applying the manifestation theory to DES-related diseases have denied the insured coverage from insurers on the risk prior to ultimate manifestation of the DES-related disease as there is no evidence of any cognizable or diagnosable injury until manifestation of the disease. *See, e.g., American Motorist Insurance Co.* v. *E.R. Squibb & Sons, Inc.*, 406 N.Y.S. 2d 658, 661 (Sup. Ct. 1978).

give consideration to the relevant policies of all the interested states. *See, e.g., Vaston Bondholders Protective Committee* v. *Green*, 329 U.S. 156, 161-62 (1946). Moreover, in cases of insurance, a court will look at the following factors to determine which law will apply: 1) the residence of the insured, 2) the place where the application was completed, 3) the places where the policy was negotiated, consummated, and delivered, and 4) the situs of the insured risk. *See Stevens*, 234 A.2d at 309. Applying these principles to this case, it is clear that Indiana has the most significant contacts with the policies at issue and thus, the "more substantial interest" in the interpretation and application of these insurance policies. Eli Lilly, the insured, is an Indiana corporation with its principal place of business in Indiana. Indiana was a principal site of the negotiations and agreement on the terms of the coverage provisions and other pertinent provisions in these policies. More significantly, however, Eli Lilly and at least one of its insurers negotiated and preliminarily agreed that arbitration regarding any dispute over the interpretation of the policies would take place in Indianapolis, Indiana. Accordingly, it is the finding of this Court that Indiana law governs the interpretation of these insurance contracts.

B. Summary Judgment

Under Rule 56 of the Federal Rules of Civil Procedure, a motion for summary judgment is properly granted where the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, substantiate that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Indeed, when ruling on a motion for summary judgment, it is not the Court's function to "[t]ry disputed issues of [material] fact, but only to ascertain whether such an issue is present, and any doubt on that score is to be resolved against the movant." *Abraham* v. *Graphic Arts Int'l Union*, 660 F.2d 811, 814 n.24 (D.C. Cir. 1981). A court must also be mindful, how-

ever, that a valuable objective of Rule 56 is to avoid useless trials when there are really no triable issues of fact for the factfinder to determine. *See, e.g., Merit Motors, Inc.* v. *Chrysler Corp.*, 417 F. Supp. 263 (D.D.C. 1976), *aff'd*, 569 F.2d 666 (D.C. Cir. 1977); *Zweig* v. *Hearst Corp.*, 521 F.2d 1129 (9th Cir. 1975), *cert. denied*, 423 U.S. 1025 (1975).

Defendants contend that discovery has unveiled a multitude of material facts that are genuinely disputed by the parties. Specifically, defendants argue that a real controversy exists over the authorship of the policy language, Lilly's actual intent to purchase single-trigger coverage for delayed-manifestation claims, and medical evidence as to when DES-related injuries occur. To the contrary, Eli Lilly maintains that these facts are immaterial since the obligations of defendants to indemnify it for DES-related claims are determined by the precepts enunciated by the D.C. Circuit Court of Appeals in *Keene*, 667 F.2d 1034. Alternatively, Lilly asserts that assuming *Keene* does not control the resolution of this case, these facts are still immaterial under the basic principles governing the interpretation of ambiguous language in insurance policies which mandate the result reached in *Keene*.

In order for a fact to be deemed material within the meaning of Rule 56 it must be necessary to a court's decision. *See Marshall* v. *Kimberly-Clark Corp.*, 625 F.2d 1300 (5th Cir. 1980); *Beltz Travel Service, Inc.* v. *International Air Transport Ass'n*, 620 F.2d 1360 (9th Cir. 1980); *Cordas* v. *Specialty Restaurants, Inc.*, 470 F. Supp. 780 (D. Or. 1979). While federal law dictates the standards for determining whether summary judgment is appropriate in a diversity case, a federal district court will look to state law to ascertain what particular facts are material to a state claim. *See, e.g., Lighting Fixture & Electric Supply Co.* v. *Continental Ins. Co.*, 420 F.2d 1211 (5th Cir. 1969). As previously stated, Indiana law is the applicable and controlling law in the construction of the coverage provisions at issue in this suit. Thus, Indiana jurisprudence will define what facts are determinative to the con-

struction of CGL-type coverage provisions in cases of insidious diseases, such as DES-related diseases.

Neither the Indiana state courts nor federal courts applying Indiana law have determined when "bodily injury" occurs under a CGL-type coverage clause in cases of delayed-manifestation diseases. The absence of any Indiana decisional law on this question does not, however, relieve this Court of its duty to evaluate current Indiana law governing the interpretation of insurance policies and to make an educated prediction of how an Indiana court would interpret the coverage language in Lilly's policies. *See Hiller* v. *Franklin Mint, Inc.*, 485 F.2d 48 (3d Cir. 1973); *American Record Pressing Co.* v. *U.S. Fidelity & Guaranty*, 466 F. Supp. 1373 (S.D.N.Y. 1979).

It is firmly established in Indiana jurisprudence that an insurance policy is in substance a contract and it is governed by the fundamental principles of interpretation applied to written contracts. *See, e.g., Huntington Mutual Ins. Co.* v. *Walker*, 392 N.E. 2d 1182 (Ind. Ct. App. 1979). Accordingly, when interpreting any provision in an insurance policy the goal of an Indiana court is to ascertain the intent of the parties as disclosed by the language employed in the contract. *See, e.g., Shahan* v. *Brinegar*, 390 N.E. 2d 1036 (Ind. Ct. App. 1979). If the terms of a contract are plain and unambiguous, Indiana courts will enforce the agreement between the parties as it is written. *Id.* However, when the language is ambiguous the courts may either apply the rules to contract construction or look to extrinsic circumstances to give effect to the reasonable expectations of the parties. *See, e.g., American Economy Ins. Co.* v. *Liggett*, 426 N.E. 2d 136, 141-142; *Shahan* v. *Brinegar*, 390 N.E. 2d at 1041 (Ind. Ct. App. 1979).

Whether an Indiana court will resort to the basic principles of contract construction or extrinsic evidence to determine the reasonable expectations of the parties depends upon the type and purpose of the contract. For example, in *Shahan* v. *Brinegar*, 390

N.E. 1036, the Indiana Court of Appeals looked to such extrinsic evidence as the facts and circumstances leading up to the execution of the agreement where the contract was for the lease of real property and the sale of certain equipment. *Id.* at 1041-42. To the contrary, the Indiana Court of Appeals in *United Farm Bureau Mutual Insurance Co.* v. *Brantley*, 375 N.E. 2d 235, 237 (Ind. Ct. App. 1978), applied the fundamental principles of construction of insurance policies to give effect to the reasonable expectations of the parties to the insurance contract. *See also American Economy Ins. Co.*, 426 N.E. 2d at 139, 131; *Mutual Hospital Insurance Co.* v. *Klapper*, 288 N.E. 2d 279 (Ind. Ct. App. 1972) (construing ambiguous language in a health insurance policy to give effect to the insured's reasonable expectation to receive indemnification and the insurer's expectation to provide indemnification for nonfraudulent claims). Thus, it appears that in cases where the contract is one for insurance, Indiana courts will employ the basic principles governing the interpretation of insurance policies to give effect to the parties' reasonable expectations rather than conduct a searching inquiry into extrinsic evidence. Under this approach such extrinsic evidence as the actual intent of the insured is not necessary to the Court's construction of ambiguous language in an insurance policy.[15] *Cf. American Economy Insurance Co.*, 426 N.E. 2d at 141-142; *United Farm Bureau Mutual Insurance Co.*, 375 N.E. 2d at 237. Accordingly, the Court finds that the extrinsic evidence proferred by defendants is not necessary to the Court's construction of the policies issued to Lilly. The remaining task for this Court is to make an educated determination of 1) the construction an Indiana court would give the coverage provisions in Lilly's policies; 2) the extent of coverage the court

[15] In *Keene*, the record before the Court of Appeals contained evidence regarding the negotiation and drafting of the policies, Keene's alleged sophistication and economic power, and Keene's actual expectation to receive "single trigger" coverage. Nonetheless, the Court of Appeals viewed this evidence as nondeterminative and applied the doctrine of "objective reasonable expectations."

would afford Lilly under the policies; and 3) the allocation of liability theory the court would adopt.

Trigger of Coverage

Under the interpretative law of Indiana, the terms "bodily injury," "sickness," and "disease" are ambiguous when used in the context of insidious diseases since reasonable persons could honestly give different meanings to these words. *See, e.g., Jeffries* v. *Stewart*, 309 N.E. 2d 448, 452 (Ind. Ct. App. 1974). Since there is no Indiana authority addressing the question of when "bodily injury" occurs in cases of insidious diseases under a CGL-type coverage provision, Indiana courts will "seek succor from other jurisdictions" which have ruled on the issue.[16] *See, e.g., Mutual Hospital Insurance Co.*, 288 N.E. 2d at 279. The several courts which have construed these CGL-type coverage clauses in cases of insidious diseases have defined injury under either the manifestation, exposure, or multi-trigger theory of liability. *See, e.g., American Motorists Insurance Co.* v. *E.R. Squibb & Sons, Inc.*, 406 N.Y.S.2d 658 (N.Y. Sup. Ct. 1978); *Insurance Co. of North America* v. *Forty-Eight Insulations, Inc.*, 633 F.2d 1212, 1222 (6th Cir. 1980), *reh'g granted in part and denied in part*, 657 F.2d 814 (1981), *cert. denied*, 454 U.S. 1109 (1981); *Keene* v. *Insurance Co. of North America*, 667 F.2d 1034 (D.C. 1981), *cert. denied*, 455 U.S. 1007 (1982).

Those courts which have adopted the manifestation theory of when "bodily injury" occurs under the ambiguous CGL terms engage in an exhaustive investigation of extrinsic evidence to derive the intent of the parties. *See e.g., Eagle-Picher Industries, Inc.* v. *Liberty Mutual Insurance*, 682 F.2d 12 (1st Cir. 1982). Courts that construe the occurrence of a "disease" or "bodily injury" under the exposure theory, however, rely heavily on med-

[16] In attempting to determine the result that an Indiana court would reach, this Court may also refer to such sources as the restatements of law, insurance law treatises, and law review commentaries. *See American Record Pressing Co.* v. *U.S. Fidelity & Guaranty Co.*, 466 F. Supp. 1373 (S.D.N.Y. 1979).

ical evidence of the etiology and progress of the particular insidious disease and the strong policy to broadly construe insurance policies to promote coverage. *See, e.g., Insurance Company of North America* v. *Forty-Eight Insulations*, 633 F.2d 1212. Only those courts that embrace the multi-trigger construction of "bodily injury" truly resort to the basic principles governing the interpretation of ambiguous insurance policies to give effect to the reasonable expectations of the insured and insurer. *See Crown, Cork & Seal Company, Inc.*, No. 1292 (Pa. Aug. 21, 1983); *Keene*, 667 F.2d 1034.[17] It is most likely then that Indiana courts would adopt the logic of *Keene* given their preference to employ the fundamental rules of construction to effectuate the state's strong policy to construe insurance contracts in a manner that both promotes coverage and favors the legitimate expectations of the parties.

Adhering to the principles enunciated in *Keene*, the Court finds that proper construction of the coverage provisions in Lilly's policies is that each insurer on the risk between the initial ingestion of DES and the manifestation of a DES-related disease is liable to Lilly for indemnification. The coverage terms in Lilly's policies are either identical or functionally identical to the CGL terms in Keene's policies. Furthermore, the policy language does not lead the Court "unambiguously to either the 'exposure' or 'manifestation' interpretation" for such latent diseases as DES-related diseases. *Keene*, 667 F.2d at 1043. Most importantly, Lilly could have reasonably expected that it was purchasing coverage for all future liability arising from its product, DES.

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[17] These generally accepted principles of interpretation of insurance policies are: 1) in construing the scope of coverage under insurance policies, the objective must be to give effect to the policies' dominant purpose of indemnity; 2) ambiguity in an insurance contract should be construed in favor of the insured; and 3) the court should ordinarily strive to give effect to the objectively reasonable expectations of the insured. *See generally* COUCH ON INSURANCE 2D, § § 15:14, 15:16, 15:22, 15:41 (2d ed. Anderson 1959); 4 WILLISTON ON CONTRACTS, § § 621, 900 (3d ed. Jaeger 1959).

The Extent of Coverage and Allocation of Liability

The polices at issue in this case, as those in *Keene*, provide that the insurance company will indemnify Lilly for all sums that Lilly becomes legally obligated to pay. As a result of this Court's multi-trigger construction of "bodily injury," the issue of whether an insurer is liable in full, or in part, for Lilly's liability must be addressed. It is the holding of the Court that an insurer is liable in full once coverage under its policy is triggered. However, Lilly can only apply one policy's limit to each injury and it may select the policy under which it is to be indemnified. *See Keene*, 667 F.2d at 1049-50, *citing Forty-Eight Insulations*, 633 F.2d at 1226 n.28. In addition, since it is likely that the coverage of more than one insurer will be triggered in any suit against Lilly for a DES-related disease, Lilly's full indemnification from an elected insurer is subject to those provisions in the policies that govern the allocation of liability when more than one policy covers an injury. *See Keene*, 667 F.2d 1050. This limitation does not, however, weaken the "primary duty of the insurers whose coverage is triggered by exposure or manifestation . . . to ensure that [Lilly] is indemnified in full." *Id.* An Order consistent with this Opinion will be entered on this date.

/s/

NORMA HOLLOWAY JOHNSON
United States District Judge

DATED: April 12, 1984

APPENDIX E

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5391

September Term, 1985

Civil Action No. 82-669

Eli Lilly and Company

v.

Home Insurance Company, *et al.*

Fireman's Fund Insurance Company,[1]
Appellant

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
FOLLOWING REMAND FROM
THE SUPREME COURT OF INDIANA

[1] Consolidated with the following cases (identified by this court's case number and appellant(s)), in all of which Eli Lilly & Company is the appellee: 84-5394, Zurich American Insurance Company; 84-5395, International Surplus Lines Insurance Company et al.; 84-5396, Interstate Fire & Casualty Company et al.; 84-5397, American Employers' Insurance Company; 84-5398, Falcon Insurance Company; 84-5397, American Employers' Insurance Company; 84-5398, Falcon Insurance Company; 84-5399, Mutual Fire, Marine & Inland Insurance Company; 84-5400, St. Paul Fire & Marine Insurance Company; 84-5401, American Home Assurance Co. et al.; 84-5402, Insurance Company of North America et al.; 84-5403, American Motorists Insurance Company et al.; 84-5404, Aetna Casualty & Surety Company et al.; 84-5405, Allan Peter Denis Haycock and Paul Malcolm Johnson et al.; 84-5406, Home Insurance Company; and 84-5407, Travelers Indemnity Company.

Before: EDWARDS and SCALIA, Circuit Judges, and WRIGHT, Senior Circuit Judge.

JUDGMENT

These causes came on for consideration following remand from the Supreme Court of Indiana. On consideration thereof, it is

ORDERED and ADJUDGED, by this Court, that the judgment of the District Court is hereby affirmed, in accordance with the Opinion for the Court filed herein this date.

Per Curiam
For The Court

/s/
George A. Fisher
Clerk

Date: June 24, 1986
Opinion for the Court filed by Senior Circuit Judge Wright.

United States Court of Appeals
For the District of Columbia Circuit

FILED JUNE 24, 1986

GEORGE A. FISHER
Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5391

September Term, 1985

CA No. 82-00669

Eli Lilly and Company

v.

The Home Insurance Co., *et al.*

And Consolidated Case Nos. 84-5394, 84-5395, 84-5396, 84-5397, 84-5398, 84-5399, 84-5400, 84-5401, 84-5402, 84-5403, 84-5404, 84-5405, 84-5406 and 84-5407

BEFORE: EDWARDS and SCALIA, Circuit Judges; WRIGHT, Senior Circuit Judge

ORDER

Upon consideration of the petitions for rehearing of the Insurers and of Falcon Insurance Company and Mutual Fire, Marine and Inland Insurance Company, and of the joinders therein, it is

ORDERED, by the Court, that the petitions for rehearing are denied.

Per Curiam
FOR THE COURT:
GEORGE A. FISHER,
CLERK

BY: /s/
Robert A. Bonner
Chief Deputy Clerk

United States Court of Appeals
For the District of Columbia Circuit

FILED AUG. 22, 1986

GEORGE A. FISHER
Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5391

September Term, 1985

CA No. 82-00669

Eli Lilly and Company

v.

The Home Insurance Co., *et al.*

And Consolidated Case Nos. 84-5394, 84-5395, 84-5396, 84-5397, 84-5398, 84-5399, 84-5400, 84-5401, 84-5402, 84-5403, 84-5404, 84-5405, 84-5406 and 84-5407

BEFORE: Wald, Chief Judge; Robinson, Mikva, Edwards, Ginsburg, Bork, Scalia, Starr, Silberman, Buckley and Williams, Circuit Judges; Wright, Senior Circuit Judge

ORDER

The suggestion for rehearing *en banc* of the Insurers, and the joinder therein, have been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc,* that the suggestion is denied.

Per Curiam

FOR THE COURT:
GEORGE A. FISHER,
CLERK

BY: /s/
Robert A. Bonner
Chief Deputy Clerk

Chief Judge Wald did not participate in this order.

United States Court of Appeals
For the District of Columbia Circuit

FILED AUG. 22, 1986

GEORGE A. FISHER
Clerk

APPENDIX F

CONSTITUTIONAL PROVISIONS

U.S. Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Constitution, Amendment XIV, Section 1

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES

28 U.S.C. § 1652

State Laws as Rules of Decision

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

28 U.S.C. § 2071

Rule-making Power Generally

The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court.

28 U.S.C. § 2072

Rules of Civil Procedure

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

RULES

Fed. R. Civ. P. 56(c)

Summary Judgment

(c) *Motion and Proceedings Thereon.* The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Fed. R. Evid. 101

Scope

These rules govern proceedings in the courts of the United States and before United States magistrates, to the extent and with the exceptions stated in rule 1101.

Fed. R. Evid. 401

Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Fed. R. Evid. 402

Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Fed. R. Evid. 1101

Applicability of Rules

(a) *Courts and magistrates.* These rules apply to the United States district courts, the District Court of Guam, the District Court for the Virgin Islands, the District Court for the District of the Canal Zone, the United States courts of appeals, the United States Claims Court, and to United States magistrates, in the actions, cases, and proceedings and to the extent hereinafter set forth. The terms "judge" and "court" in these rules include United States magistrates.

(b) *Proceedings generally.* These rules apply generally to civil actions and proceedings, including admiralty and maritime cases, to criminal cases and proceedings, to contempt proceedings except those in which the court may act summarily, and to proceedings and cases under title 11, United States Code.

(c) *Rule of privilege.* The rule with respect to privileges applies at all stages of all actions, cases, and proceedings.

(d) *Rules inapplicable.* The rules (other than with respect to privileges) do not apply in the following situations:

(1) *Preliminary questions of fact.* The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under rule 104.

(2) *Grand jury.* Proceedings before grand juries.

(3) *Miscellaneous proceedings.* Proceedings for extradition or rendition; preliminary examinations in criminal cases; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.

(e) *Rules applicable in part.* In the following proceedings these rules apply to the extent that matters of evidence are not provided for in the statutes which govern procedure therein or in other rules prescribed by the Supreme Court pursuant to statutory authority: the trial of minor and petty offenses by United States magistrates; review of agency actions when the facts are subject to trail de novo under section 706(2)(F) of title 5, United States Code; review of orders of the Secretary of Agriculture under section 2 of the Act entitled "An Act to authorize association of producers of agricultural products" approved February 18, 1922 (7 U.S.C. 292), and under Sections 6 and 7(c) of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499f, 499g(c)); naturalization and revocation of naturalization under sections 310-318 of the Immigration and Nationality Act (8 U.S.C. 1421-1429); prize proceedings in admiralty under sections 7651-7681 of title 10, United States Code; review of orders of the Secretary of the Interior under section 2 of the Act entitled "An Act authorizing associations of producers of aquatic products" approved June 25, 1934 (15 U.S.C. 522); review of orders of petroleum control boards under section 5 of the Act entitled "An Act to regulate interstate and foreign commerce in petroleum and its products by prohibiting the shipment in such commerce of petroleum and its products produced in violation of State law, and for other purposes", approved February 22, 1935 (15 U.S.C. 715d); actions for fines, penalties, or forfeitures under part V of title IV of the Tariff Act of 1930 (19 U.S.C. 1581-1624), or under the Anti-Smuggling Act (19 U.S.C. 1701-1711); criminal libel for condemnation, exclusion of im-

ports, or other proceedings under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301-392); disputes between seamen under sections 4079, 4080, and 4081 of the Revised Statutes (22 U.S.C. 256-258); habeas corpus under sections 2241-2254 of title 28, United States Code; motions to vacate, set aside or correct sentence under section 2255 of title 28, United States Code; actions for penalties for refusal to transport destitute seamen under section 4578 of the Revised Statutes (46 U.S.C. 679); actions against the United States under the Act entitled "An Act authorizing suits against the United States in admiralty for damage caused by and salvage service rendered to public vessels belonging to the United States, and for other purposes", approved March 3, 1925 (46 U.S.C. 781-790), as implemented by section 7730 of title 10, United States Code.

Ind. R. App. P. 11(A)

(A) Rehearings. Application for a rehearing of any cause may be made by petition, separate from the briefs, signed by counsel, and filed with the clerk within twenty (20) days from rendition of the decision, stating concisely the reasons why the decision is thought to be erroneous. Such application may, if desired, be supported by briefs, but such briefs will not be received after the time allowed for filing the petition. Parties opposing the rehearing may file briefs within ten (10) days after the filing of the petition. No extension of time shall be granted for the filing of a petition for rehearing or any brief in connection therewith.

Ind. R. App. P. 15(0)

(O) Certification of questions of state law from federal courts. When it shall appear to the Supreme Court of the United States, to any circuit court of appeals of the United States, or to the court of appeals of the District of Columbia, that there are involved in any proceeding before it questions or propositions of the laws of this state, which are determinative of the said cause, and there are

no clear controlling precedents in the decisions of the Supreme Court of this state, such federal appellate court may certify such questions or propositions of the laws of this state to the Supreme Court of this state for instructions concerning such questions or propositions of state law which certificate the Supreme Court of this state, by written opinion, may answer.

APPENDIX G

LISTING OF PARENTS, SUBSIDIARIES, AND AFFILIATES OF CORPORATE PETITIONERS REQUIRED BY SUPREME COURT RULE 28.1

This listing of parents, subsidiaries, and affiliates is in two parts: those of petitioners other than companies subscribing policies issued in the London insurance market are set forth on pages 1g-11g; those of companies subscribing percentages of policies issued in the London insurance market follow after the break on page 11g.

The Aetna Casualty and Surety Company. The Aetna Casualty and Surety Company is a subsidiary of Aetna Life and Casualty Company. The Aetna Casualty and Surety Company has interests in the following subsidiaries (excepting wholly owned subsidiaries), partnerships, and joint ventures: AEGEN International, Inc.; South Bend Joint Venture; Taas Associates; Mariner Brookhollow Joint Venture; Portside Properties, Ltd.; ADBI; Ponderosa Homes; ABP Associates Limited; Northlake Centre Associates; Parklake Associates; Aetna, Peterson, Jacobs and Ramo Technology Ventures, and Church Insurance Partnership Agency. Two wholly-owned subsidiaries of Aetna Casualty and Surety Company, A.E. Investments, Inc., and A.E. Properties, Inc., own interests in a number of partnerships and joint ventures. In addition to the foregoing, Aetna Life and Casualty Company, the parent of Aetna Casualty and Surety Company, has interests in a very large number of subsidiaries, partnerships, and joint ventures. Should the Court wish a list of these entities, counsel will provide one.

Pacific Indemnity Company. Pacific Indemnity Company is a subsidiary of Federal Insurance Company, which is a subsidiary of The Chubb Corporation. Pacific Indemnity Company has the following subsidiaries: Northwestern Pacific Indemnity Company and Texas Pacific Indemnity Company.

Federal Insurance Company. Federal is a subsidiary of The Chubb Corporation. Federal has the following subsidiaries or

affiliates: Vigilant Insurance Company, CC Canada Holdings Ltd., KGMG, Inc., Bolivar Comp De Seguros Del Ecuador, Chubb Insurance Company of New Jersey, Chubb Custom Insurance Company, Chubb Life Insurance Company, Chubb Syndicate, Great Northern Insurance Company, La Federation Compania De Segurus CA, La Federation Europeene D'Assurance, Seguros Illimani, Pacific Indemnity Company, Chubb Lloyds Insurance Company of Texas, and Bellemead Development Corporation.

American Home Assurance Company. American Home is a wholly-owned subsidiary of American International Group, Inc.

Lexington Insurance Company. Lexington is a subsidiary of Birmingham Fire and Marine Insurance Company, The Insurance Company of The State of Pennsylvania, and National Union Fire Insurance Company of Pittsburgh, Pennsylvania.

The Insurance Company of the State of Pennsylvania. The Insurance Company of the State of Pennsylvania is a wholly-owned subsidiary of American International Group, Inc.

National Union Fire Insurance Company of Pittsburgh, Pa. National Union Fire Insurance Company of Pittsburgh, Pa. is a wholly-owned subsidiary of American International Group, Inc.

The Home Insurance Company. The Home is a subsidiary of The Home Group, Inc., which is a subsidiary of City Investing Company. The Home has the following subsidiaries or affiliates: City Insurance Company, The Home Indemnity Company, The Home Insurance Company of Illinois, The Home Insurance Company of Indiana, Inc., Home Lloyd's Insurance Company of Texas, The Home Reinsurance Company, CitiVest International, Ltd., Air Marine Claims, Inc., Global Aviation Insurance Services, Imperial Premium Finance, Inc., Primex Insurance Adjusters, Inc., Reandex Home International Limited, Scott-Wetzel Services, Inc., Rolfe Group, Ltd., Sterling Forest Corporation, Thico Plan, Inc., Thico Finance, Inc., Home Re Syndicate, Inc., City Insurance Company, Ltd. (U.K.), CitiVest Reinsurance, Ltd. (Bermuda), and Commonwealth Insurance Company (Canada).

The Mutual Fire, Marine and Inland Insurance Company. The Mutual Fire, Marine and Inland Insurance Company has the following subsidiaries or affiliates: Rhine Reinsurance Company, Inc., UMI Holdings, Inc., First New York Syndicate Corp., and UMI Underwriters, Inc.

Falcon Insurance Company. Falcon is a subsidiary of American Employers' Insurance Company, which is a subsidiary of Commercial Union Corporation.

American Employers' Insurance Company. American Employers' is a subsidiary of Commercial Union Corporation. American Employers' has the following subsidiaries: Falcon Insurance Company and AEIC Leasing Inc.

Insurance Company of North America. Insurance Company of North America is a wholly-owned subsidiary of INA Financial Corporation, a wholly-owned subsidiary of INA Corporation. In turn, INA Corporation is a wholly-owned subsidiary of CIGNA Holdings, Inc. which is a wholly-owned subsidiary of CIGNA Corporation, the ultimate parent company and a publicly traded company. Insurance Company of North America's subsidiaries (except fourteen (14) wholly-owned subsidiaries) and affiliates (see 26 U.S.C. §§ 1501, 1502, 1504; Treas. Reg. § 1.1502-1) are: CIGNA Venture Capital, Incorporated (Delaware), Compagnie d'Assurances Colina S.A. (Ivory Coast); Compagnie Financiere INA (France); Compagnie Nouvelle d'Assurances (France); Domestic PASTI (a Connecticut general partnership); INA County Mutual Insurance Company (Texas); INA International Investors, Ltd. (Pennsylvania); INAMEX S.A. (Mexico); La Nouvelle, S.A. (France); Reston Offices-1 Incorporated (Delaware) and Societe Civile Immobiliere Turina (France). In addition, Insurance Company of North America, through a wholly-owned subsidiary, has a sixty percent interest in AFIA, an unincorporated association, of which the balance is owned by an affiliated company that is a wholly-owned subsidiary of CIGNA Holdings, Inc. In turn, AFIA has indirect interests in various insurance and insurance-related companies which are all domiciled and operated outside the United States of America.

In addition to the foregoing, the parent companies of Insurance Company of North America have varying direct and indirect ownership interests in over 500 other insurance, insur-

ance-related, health care, real estate, and investment companies, both domestic and foreign, including Connecticut General Corporation, Connecticut General Life Insurance Company, INA Corporation, Paine Webber Group Inc. (approximately a 10.94% interest as of July 28, 1986), and their respective subsidiaries and affiliates. Should the Court desire listings of the subsidiaries and affiliates of these companies, including the subsidiaries and affiliates of Paine Webber Group Inc., Insurance Company of North America will supplement its listing.

California Union Insurance Company. California Union is a subsidiary of Insurance Company of North America.

Horace Mann Insurance Company. Horace Mann is a subsidiary of Teachers Insurance Company, which is a subsidiary of Horace Mann Educators Corporation. Horace Mann Educators Corporation is a subsidiary of Insurance Company of North America.

The Travelers Indemnity Company. The Travelers Indemnity Company is a subsidiary of The Travelers Corporation. The Travelers Indemnity Company has the following subsidiaries or affiliates: The Charter Oak Fire Insurance Company, Constitution State Insurance Company, The Phoenix Insurance Company, The Travelers Indemnity Company of America, The Travelers Indemnity Company of Rhode Island, The Travelers Insurance Company of Illinois, Travelers Corporation (U.K.) Ltd., Travelers Illinois Syndicate, Travelers Reinsurance Company of Bermuda Limited, Travelers Syndicate No. 1, Inc., and Travelers Lloyds Insurance Company.

Interstate Fire & Casualty Company. Interstate Fire & Casualty is a subsidiary of Fireman's Fund Insurance Company, which is a subsidiary of Fireman's Fund Corporation. Interstate Fire & Casualty has the following subsidiaries: Chicago Insurance Company and Interstate Indemnity Company.

Interstate Indemnity Company. Interstate Indemnity is a subsidiary of Interstate Fire & Casualty Company. Interstate Fire & Casualty Company is a subsidiary of Fireman's Fund Insurance Company, which is a subsidiary of Fireman's Fund Corporation.

St. Paul Fire and Marine Insurance Company. St. Paul Fire and Marine is a subsidiary of The St. Paul Companies, Inc. St. Paul Fire and Marine has the following subsidiaries: St. Paul Guardian Insurance Company, The St. Paul Insurance Company, The St. Paul Insurance Company of Illinois, St. Paul Mercury Insurance Company, St. Paul Fire and Casualty Insurance Company, St. Paul Indemnity Insurance Company, St. Paul Property and Casualty Insurance Company, St. Paul Insurance Company of North Dakota, Atwater McMillian, Inc., Polaris Syndicate Corp., St. Paul Properties Inc., Mercury Reinsurance Company (U.K.) Ltd., St. Paul Oil and Gas Corporation, and Western Life Insurance Company.

American Motorists Insurance Company. American Motorists is a subsidiary of Kemper Corporation, which is a subsidiary of Lumbermens Mutual Casualty Company. American Motorists has the following subsidiaries or affiliates: American Protection Insurance Company, Federal Kemper Life Assurance Company, Federal Kemper Insurance Company, AMICO Realty Corporation, BBC Associates, Inc., Central Mortgage Company, Kemci, S.A., Kemper Europe Reassurance, Kemper S.A., National Agents Service Company, Inc., PBT Holding Company, Inc., KAAL PGA Sales, Inc. and Triangle Outpost Estates.

Lumbermens Mutual Insurance Company. Lumbermens Mutual has the following subsidiaries or affiliates: Kemper Corporation, American Motorists Insurance Company, American Protection Insurance Company, Economy Fire & Casualty Company, Economy Preferred Insurance Company, Federal Kemper Insurance Company, Federal Kemper Life Assurance Company, Iowa Kemper Insurance Company, Kemper International Insurance Company, Kemper Investors Life Insurance Company, Kemper Reinsurance Company, National Automobile and Casualty Insurance Company, Retcom Reinsurance Company, Sequoia Insurance Company, Kemper, S.A. (Belgium), Kemper Europe Reassurances, S.A. (Belgium), Kemper Insurance Company, Limited (Australia), Kemper International Insurance Company (PTE), Limited (Singapore), Kemper Reinsurance (Bermuda), Limited, Kemper Reinsurance London Limited (England), The Seven Continents Insurance Company, Limited (Bermuda), American Underwriting Corp., Associated Mutuals, Inc., BBC Associates, Inc., Central Mortgage Company,

Kemci S.A., Kemper Realty Corp., National Agents Service Co., Inc., Twenty North Wacker Corp., Wacker Drive Safe Deposit Company, Kemper Lloyds Insurance Company, Batehill, Inc., AMICO Realty Corporation, PBT Holding Company, Inc., and Triangle Outpost Estates.

Fireman's Fund Insurance Company. Fireman's Fund is a direct subsidiary of Fireman's Fund Corporation. Fireman's Fund has the following subsidiaries or affiliates: American Automobile Insurance Company, The American Insurance Company, Associated Indemnity Corporation, Chicago Insurance Company, Fireman's Fund Insurance Company of Iowa, Fireman's Fund Insurance Company of Georgia, Fireman's Fund Insurance Company of Hawaii, Inc., Fireman's Fund Insurance Company of Louisiana, Fireman's Fund Insurance Company of Ohio, Fireman's Fund Insurance Company of Texas, Fireman's Fund Insurance Company of Wisconsin, Interstate Fire & Casualty Company, Interstate Indemnity Company, National Surety Corporation, San Francisco Reinsurance Company, Southern Fund Insurance Corporation, Southern Guaranty Insurance Company, Southern Guaranty Insurance Company of Georgia, San Francisco Insurance Company (U.K.) Ltd., Fireman's Fund Indemnity Corporation, and Fireman's Fund Insurance Company of New Jersey.

Zurich Insurance Company. Zurich Insurance Company has the following subsidiaries or affiliates: Zurich Holding Company of America, Inc., Universal Underwriters Insurance Company, Empire Fire and Marine Insurance Company, Empire Indemnity Company, Universal Underwriters Life Insurance Company, Universal Underwriters of Texas, Universal Underwriters Lloyds, Zurich American Life Insurance Company, Fidelity and Deposit Company of Maryland, Fidelity and Deposit Company, American Guarantee and Liability Insurance Company, American Zurich Insurance Company, Zurich American Insurance Company of Illinois, Vita Life of Zurich, Hispania of Barcelona, Kosmos of Vienna, Bedford General and Zurich Life of Portsmouth, Zurich Australian Insurance, Zurich Australian Life Insurance, and Shield (all of Sydney), Deutsche Allgemeine of Frankfort, Turegum of Zurich, Alpina of Zurich, Metropole of Lisbon, Zurich Kautions of Frankfort, Abri of Paris, Agrippina of Cologne, Zurich Life of Canada, Patria of Cologne, Danubio

of Rome, LaGarante Generale Morocaine of Casablanca, and Alstadt Insurance Company of Zurich.

International Surplus Lines Insurance Company. International Surplus Lines is a subsidiary of Crum & Forster, Inc., which is a subsidiary of Xerox Corporation. International Surplus Lines has the following subsidiaries or affiliates: C & F Managers, L.W. Biegler Syndicate, and Richard Whiley, Inc.

Central National Insurance Company of Omaha. Central National Insurance Company of Omaha is a subsidiary of Champion International Corporation and has the following subsidiaries or affiliates: The Protective National Insurance Company of Omaha, Angelina Casualty Company, St. Regis Paper Company, Drum Financial Corporation, Pinetree General Insurance Company Ltd. (Bermuda), and Pinetree Universal Insurance Company Ltd. (Bermuda).

The Continental Insurance Company. The Continental Insurance Company is a subsidiary of The Continental Corporation. The Continental Insurance Company has the following subsidiaries or affiliates: The Continental Insurance Company (Europe) Ltd., AFCO Credit Corporation, Maiden Lane Syndicate, South Place Syndicate, Appleton & Cox Corporation, The National Life Assurance Company of Canada, CIC Asset Management Corporation, 180 Group, Inc., BHC Seguros Devida (A Chilean Corporation), BHC Seguros Generals (A Chilean Corporation), Phoenix Assurance Company, Ltd. (England), Cenguard Holding Corporation, Revolution Oil Corporation, The Continental Insurance Company (U.K.) Ltd., Continental Reinsurance Corporation (U.K.) Ltd., Cenguard Insurance Corporation, and Phoenix Continental Management Ltd.

Continental Casualty Company. Continental Casualty is a subsidiary of CNA Financial Corporation, which is a subsidiary of Loews Corporation. Continental Casualty has the following subsidiaries: American Casualty Company of Reading, Pa., CNA Casualty Company of California, CNA Casualty Company of Puerto Rico, Columbia Casualty Company, Continental Assurance Company, CNA Services, Inc., CNA Realty Corporation, Larwin Developments, Inc., LPC Corporation, National Fire Insurance Company of Hartford, 1911 Corporation, Transportation Insurance Company, Claims Administration Corpo-

ration, CNA Automation, Inc., and Mid-States Life Insurance Company of America.

Employers Insurance of Wausau — A Mutual Company. Employers Insurance of Wausau — A Mutual Company has the following subsidiaries: Wausau Insurance Co. (U.K.) Ltd., Wausau Service Corporation, Wausau Underwriters Insurance Company, Illinois Employers Insurance Company of Wausau, Employers Life Insurance Company of Wausau, Wausau Life Insurance Company, Wausau International Underwriters, Wausau Underwriters Life Insurance Company, Worldwide Underwriters Insurance Company, and Underwriters Insurance Company.

Eagle Star Insurance Company Ltd. (Canada). Eagle Star is a subsidiary of Eagle Star Insurance Company Ltd. (U.K.), which is a subsidiary of Eagle Star Holdings plc. Eagle Star has the following subsidiaries: Asian Eagle Insurance Company Ltd. (Hong Kong), Australian Eagle Insurance Company Ltd. (Australia), British African Properties Ltd. (South Africa), British Caribbean Insurance Company Ltd. (Jamaica), City of London Insurance Company Ltd., Eagle Pension Funds Ltd., Eagle Star Farms Ltd., Eagle Star Group Engineering Insurance Ltd., Eagle Star Insurance Company of America, Eagle Star Insurance (Malta), Eagle Star Investments Ltd., Groupe Eagle Star-Compagnie de Bruxelles 1821 S.A. (Belgium), Home & Overseas Insurance Company Ltd., Liverpool Reversionary Company Ltd., Midland Assurance Ltd., Navigators & General Insurance Company Ltd., Sceptre Trust Ltd. (Bahamas), Shield Insurance Company Ltd. (Republic of Ireland), South African Eagle Insurance Company Ltd. (South Africa), Threadneedle Insurance Company Ltd., and Threadneedle Properties (S.A.) Ltd. (South Africa).

First State Insurance Company. First State is a subsidiary of International Telephone and Telegraph Corporation. First State has the following subsidiaries or affiliates: Hartford Accident and Indemnity Company, Hartford Fire Insurance Company, New England Reinsurance Corporation, and New England Insurance Company.

Admiral Insurance Company. Admiral is a subsidiary of Jersey/International Group, Inc., which is a subsidiary of W.R. Berk-

ley Corporation. Admiral has the following subsidiaries or affiliates: Southwest/International Underwriting Managers, Inc., Commander/International Underwriting Managers, Inc., and Olympus Insurance Company.

Argonaut Insurance Company. Argonaut is a subsidiary of Teledyne, Inc. Argonaut has the following subsidiaries or affiliates: Argonaut-Midwest Insurance Company, Argonaut-Northwest Insurance Company, Argonaut-Southwest Insurance Company, Argonaut Surplus Lines, Inc., Fireside Securities Corporation, Georgia Insurance Company, Great Central Insurance Company, Teledyne Properties, Inc., MIC Investments, Inc., and Unicoa Corporation.

Midland Insurance Company. Midland, which is presently undergoing liquidation through regulatory proceedings, has been a subsidiary of Bush Universal, Inc., which was a subsidiary of Katy Industries, Inc. Midland has had the following subsidiaries: Midland Property and Casualty Insurance Company, Mid-Re Insurance Company, Ltd. (Bermuda), and Schedule Finance Corporation.

Mission Insurance Company. Mission, which is subject to an order to stay associated with regulatory proceedings, has been a subsidiary of Mission American Insurance Company. Mission has had the following subsidiaries: Mission National Insurance Company, Mission Insurance Company of Texas, and Mission Reinsurance Corporation.

National American Insurance Company of New York. National American Insurance Company of New York is a subsidiary of H.F. Ahmanson & Company.

North Star Reinsurance Corporation. North Star Reinsurance Corporation is a subsidiary of General Re Corporation.

Unigard Security Insurance Company. Unigard Security (formerly Unigard Mutual) was reorganized in late 1984 and is now a subsidiary of John Hancock Property and Casualty Holding Company, which is in turn a subsidiary of John Hancock Mutual Life Insurance Company. Unigard Security has the following subsidiaries: Unigard, Inc., Teton National Insurance Company, Unigard Insurance Company, Unigard Indemnity Company, Unigard Olympic Life Insurance Company, Unigard Risk

Technology, Inc., Unigard Service Corporation, Unigard Service Corporation of California, Unigard Specialty Associates, Inc.

Globe Indemnity Company. Globe Indemnity Company is a subsidiary of Royal Group, Inc., which is a subsidiary of Royal Insurance plc (England). Globe Indemnity Company has the following subsidiaries or affiliates: Milbank Insurance Company and B.E.I. Services, Inc.

American Re-Insurance Company. American Re-Insurance Company is a subsidiary of Aetna Casualty & Surety Company, which is a subsidiary of Aetna Life & Casualty Company. American Re-Insurance Company has the following subsidiaries: American Excess Insurance Company, Am-Re Brokers Inc., American Re Management Co., Compania Reaseguradora Bernardo O'Higgins S.A., and American Re-Insurance (U.K.) Ltd.

General Reinsurance Corporation. General Reinsurance Corporation is a subsidiary of General Re Corporation. General Reinsurance Corporation has the following subsidiaries or affiliates: General Reinsurance Ltd. (England), General Reinsurance Corporation (Europe) (Switzerland), Reinsurance Company of Australasia Ltd. (Australia), Trident General Insurance Company Ltd. (England), Trident Life Assurance Company Ltd. (England), Trident Investors Life Assurance Company Ltd. (England), Reinsurance Underwriting Services Ltd. (U.K.), United Financial Insurance Company Ltd. (Bermuda), Shippan International Insurance Company Ltd. (Bermuda), GRC Realty Corporation, General Re Holdings Inc., General Reassurance Corporation, Elm Street Corporation, North Star Excess Insurance Company, North Star Management Corporation, and Servicios Comercales S.A.

Riunione Adriatica Di Sicurta. Riunione Adriatica Di Sicurta has the following subsidiaries or associates: Cia Europa d'Assicurazioni SpA, Lavoro & Sicurta SpA, L'Italica Vita SpA, Mutua Assicuratrice Cotoni, Cia di Genova SpA, Lloyd 1885 SpA, Unione Subalpina di Assicurazioni SpA, L'Italica SpA, Giardini Marina SpA, Immobiliare Palazzo Verrocchio Srl, Immobiliare S. Eufemia Srl, Immobiliare Scheggia SpA, Sta Finanziaria Assicurativa SpA, Sta Milanese Construzioni Srl, Ad-

riatica S.A. de Seguros (Spain), Continentale Allgemeine Versicherungs A.G. (Switzerland), Continentale Lebensversicherungs Ges (Switzerland), Cresa Aseguradora Iberica S.A. (Spain). Jefferson Insurance Co. of New York, Monticello Insurance Co. (USA), Adriatic Life Ltd. (Australia), British Reserve Insurance Co. Ltd., Joint Reinsurance and Assurance Services Ltd. (Bermuda), RAS (France), Adriatic Insurance Co. of Canada, Canadian Home Assurance Co., Domus Forsikrings A/S (Denmark), Cie de Reassurances de Paris, Nordeuropa Forsikrings A/S (Denmark), La Protectrice Vie (France), Cia Adriatica de Seguros Gerais (Brazil), Munchener Lebensversicherung A.G. (West Germany), Internationale Unfall und Schadenversicherung A.G. (Austria), La Protectrice AIAR (France), Adriatic Investments Pty Ltd. (Australia), Bickerton Ltd. (Canada), SCI (France), RAS International Holding (Luxembourg), La Vigilance (France), SoGeFo (France), and Edificios Aurora (Peru).

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Accident and Casualty Insurance Company of Winterthur. Accident and Casualty Insurance Company of Winterthur is affiliated with Winterthur Life (Switzerland), Winterthur Rechtsschutz (Switzerland), Winterthur Garantie (West Germany), Winterthur Wien (Austria), The Citadel General (Canada), Provident Life (England), The Federal (Switzerland), Union et Prevoyance (Belgium), Winterthur Assicurazioni (Italy), Europeia (Portugal), The Citadel Life (Canada), and Republic Financial Services, Inc. (USA).

Agrippina Versicherung A.G. Agrippina Versicherung A.G. is a subsidiary of Zurich Versicherungs-Gesellschaft (Switzerland). Agrippina Versicherungs A.G. has the following subsidiaries or affiliates: Agrippina Lebensversicherung A.G., Agrippina Ruckversicherung A.G., Agrippina-Zurich Rechtsschutz-Versicherung A.G., and Patria Versicherung A.G.

Alba General Insurance Company Ltd. Alba General is a subsidiary of General of Berne Insurance Company (Switzerland).

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Reinsurance Group Managers. Reinsurance Group Managers has no parent, subsidiary, or affiliate companies.

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Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

No. 86-822

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE HOME INSURANCE COMPANY, *et al.*,
Petitioners,

v.

ELI LILLY AND COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Is a federal diversity court bound by the answers of the highest court of the relevant state given in response to questions of law certified to the state court?

2. Did the petitioners timely raise the questions they seek to present and, if so, are they presented on this record and do they have any merit?

LIST OF PARTIES

Respondent Eli Lilly and Company was plaintiff-appellee below, urging affirmance of the district court's judgment. Pursuant to Rule 28.1, respondent states that it has no parent company, non-wholly owned subsidiary, or affiliate corporation. The petitioners, defendant-appellants below, are listed in the Petition for a Writ of Certiorari at ii-v. Information regarding their parents, affiliates and subsidiaries appears in the Petition for Certiorari at pp. 1g-18g.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-822

THE HOME INSURANCE COMPANY, *et al.*,
Petitioners,

v.

ELI LILLY AND COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Eli Lilly and Company, plaintiff-appellee in the proceedings below, urges the Court to deny the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on June 24, 1986.

OPINIONS BELOW, JURISDICTION AND CONSTITUTIONAL AND STATUTORY PROVISIONS

Respondent accepts Petitioners' statement as to opinions below, jurisdiction, and constitutional and statutory provisions involved, except respondent contends the Rules of Decision Act, 28 U.S.C. § 1652, is also involved. It provides that: "The laws of the several states, except

where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

STATEMENT OF THE CASE

I. Background

Respondent Eli Lilly and Company ("Lilly") is one of hundreds of companies that manufactured and sold diethylstilbestrol ("DES"), a drug that doctors prescribed for the treatment of certain pregnancy disorders, primarily the prevention of miscarriage. Lilly manufactured and sold DES for this use between 1947 and 1967. In 1971, researchers first reported a statistical association between the use of DES by pregnant women and the discovery, many years later, of a rare form of cancer in a very small percentage of the daughters from those pregnancies. Since that time some researchers have suggested correlations between the use of DES during pregnancy and various other disorders.

Lilly has been named as a defendant in hundreds of product liability lawsuits seeking damages for disorders alleged to be attributable to DES. In every case, the claimant alleges symptoms first manifesting themselves many years after exposure to or use of DES. Each case thus necessarily alleges an injury spanning many years, otherwise there could be no causation and no liability.

The petitioners (the "insurers") are all of the insurers who issued products liability insurance to Lilly from 1947 through 1976, when coverage for DES claims became unavailable. The issue in this case is the meaning of the coverage language, as applied to DES claims. All parties agree that although there are slight variations, the relevant language in all policies is identical in all material respects and is the same as the language contained in the insurance industries' standard Comprehen-

sive General Liability policy form. The insurers disagreed (and still disagree) both with Lilly and among themselves as to what the policies mean under these circumstances.

II. Proceedings Below

On March 9, 1982 Lilly commenced this action for a declaratory judgment as to the meaning of the policy language determining coverage. Lilly sought a declaration that under the policy language coverage as to these delayed manifestation claims was triggered throughout the period from exposure through manifestation. This construction had been given to the same language in *Keene Corp. v. Insurance Co. of North America*, 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982).

On March 31, 1983, Lilly filed its Motion for Summary Judgment. Lilly argued that summary judgment in its favor was mandated both under the *Keene* decision and under general principles of insurance policy construction. Lilly's position was that (a) Lilly's policies contain the same ambiguous language as that at issue in *Keene*, (b) the injuries allegedly caused by DES, like the injuries at issue in *Keene*, become manifest long after exposure, (c) *Keene* governed this case, and (d) even if *Keene* was not controlling, the general principles of insurance law recognized in Indiana mandated the same result as that reached in *Keene*.

The insurers did not dispute the facts upon which Lilly's motion was based. These were (a) the policy language is what it is, and (b) the disorders the plaintiffs in the underlying cases seek to attribute to DES manifest themselves years after exposure to the product. Rather, the insurers contended extrinsic evidence concerning the "negotiation" of the policies, the subjective expectations of the parties, and the particular etiology of the various DES-related injuries, presented factual issues that pre-

cluded summary judgment.[1] Lilly contended from the outset that the matters the insurers sought to establish through extrinsic evidence were immaterial, both under Indiana law and under the *Keene* decision. Lilly further argued that the insurers proffered evidence presented no factual disputes in any event.

On April 12, 1984, the district court granted Lilly's Motion for Summary Judgment. The district court held that Indiana law, not *Keene*, governs this dispute. Examining that law, the court concluded that the proffered evidence was immaterial as a matter of state law, and that Indiana principles governing construction of ambiguous insurance policy language would lead an Indiana court to adopt the multiple-trigger construction of the relevant language in the context of a delayed manifestation claim. The court therefore granted Lilly the requested declaratory judgment.

The insurers appealed the district court's judgment to the United States Court of Appeals for the District of Columbia Circuit. The gravamen of the appeal was that Indiana law governed the materiality of the proffered evidence and that the district court erred in holding that evidence immaterial under Indiana law. The insurers did not argue that the district court's holding of immateriality violated any constitutional right. Nor did they argue that the multiple trigger construction, determined by the district court to be the most likely one to be chosen by an Indiana court, raised any issue of constitutional dimension. Nor did the insurers argue that

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[1] The insurers also strenuously urged that further discovery was needed concerning these issues. Lilly did not oppose further discovery, and Lilly's motion was briefed again after the insurers had conducted massive additional discovery. Hundreds of thousands of pages of Lilly documents were produced and depositions were taken of nearly every living person at Lilly or at any of Lilly's insurance brokers having anything to do with Lilly's insurance. After that discovery, the insurers again argued that factual issues precluded summary judgment.

summary judgment was improper if their proffered evidence was immaterial as a matter of Indiana law. Finally, the insurers never disputed the district court's holding that the language at issue was ambiguous. Rather, they explicitly argued that the ambiguity of the language necessitated consideration of their proffered evidence as a matter of Indiana law. In short, the only issue raised on appeal by the insurers was whether their proffered extrinsic evidence would be considered under Indiana law, and whether the district court's holding on that issue mandated reversal.[2] Neither side requested certification of state law questions. The insurers did note, however, that Indiana Rule of Appellate Procedure 15(O) authorized certification of questions of Indiana law as to which there are no clear controlling precedents.

The appeal was argued to a panel of the Court of Appeals consisting of Judges Wright, Tamm, and Wald. On June 18, 1985, in an opinion of the court by Judge Wright, and joined by Judge Wald, the court agreed with the district court that Indiana law controls, but was "uncertain about the application of that law to the issues at hand." Pet. App. C at 4c. As a result the court certified the controlling questions of state law to the Indiana Supreme Court.[3]

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[2] With respect to each category of evidence the insurers claimed precluded summary judgment, all insurers argued that the district court had erred in treating the evidence as immaterial because an Indiana court would deem it material. Joint Brief of Defendants-Appellants, *passim*. The insurers recognized that "the district court held that—although an Indiana court would find the policy language ambiguous as applied to DES claims—all the defendants' proffered evidence was immaterial. . . ." *Id.* 38-39. The insurers continued: "The district court's premise is clearly wrong. Indiana would consider the defendants' substantial proffer of evidence . . . the district court ruled immaterial evidence of the precise type actually used by Indiana courts in construing insurance contracts found to be ambiguous." *Id.* 39.

[3] Judge Tamm dissented from the certification, urging affirmance of the district court's judgment and arguing that certifying the

Neither side sought any clarification or modification of the questions certified in the Court of Appeals. Neither filed or asked for leave to file any supplemental briefing before the Indiana Supreme Court. The Indiana Supreme Court had before it the insurers' detailed recitation of the specific extrinsic evidence they claimed should be considered in the interpretation of the policy language, copies of the insurers' proffered evidence, and the insurers' lengthy arguments as to why the evidence was material under Indiana law.

In a clear and concise opinion, a unanimous Indiana Supreme Court agreed completely with the district court's interpretation of Indiana law. The Indiana Supreme Court held that the extrinsic evidence proffered by the insurers was immaterial, and stated that the "construction of the ambiguous policy language should be resolved by the court as a matter of law." Pet. App. B at 6b. Finally, authoritatively construing the ambiguous policy language, the Indiana Supreme Court adopted the multiple trigger interpretation as the law of Indiana: "We hold that coverage is triggered at any point between ingestion of DES and the manifestation of a DES-related disease." *Id.* at 7b.

The insurers then filed a petition for rehearing and a 46-page brief in the Indiana court. The insurers argued that the Indiana decision actually recognized the materiality of their proffered extrinsic evidence on "authorship" and medical issues. Alternatively, the insurers argued that if the Indiana Supreme Court rejected their reading of its decision, then the Indiana common law was unconstitutional because it denied them a hearing, created irrebutable presumptions, impermissibly classified them, and deprived them of vested rights by ex post facto judicial fiat, all in violation of various provisions of the federal constitution. None of these constitutional issues

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issues to the Indiana Supreme Court "is needlessly time-consuming." Pet. App. C at 17c.

had been asserted when Lilly asked for the requested judgment, when the district court granted it, or in the Court of Appeals.

After denial of their petition for rehearing in the Indiana Supreme Court, the insurers were permitted to file post-certification briefing before the Court of Appeals. In that briefing the insurers again maintained that the Indiana decision actually held their proffered evidence to be material and in the alternative asserted, for the first time in the Court of Appeals, their newly-found constitutional issues.

On June 24, 1986, a unanimous panel of the Court of Appeals consisting of Judges Edwards, Scalia, and Wright, affirmed the judgment of the district court.[4] The Court of Appeals rejected the insurers' attempts to interpret the Indiana Supreme Court's certification decision as a holding that their proffered extrinsic evidence was material. With respect to the proffered evidence of authorship of the policies, the court stated that the "short answer to appellants' contentions is that the Indiana court did *not* make authorship a predicate of the general rules controlling the construction of insurance contracts or of its holdings in this case." Pet. App. A at 8a. The court expressly recognized that although the Indiana court's determinations of the substantive law of Indiana defining the material issues in the case were binding on a federal diversity court, the Indiana court could not determine what evidence was probative of those issues. Rather, issues of relevance were to be determined under the fedral rules of evidence. In response to the insurers' argument concerning the admissibility of its proffered evidence on etiology, the Court of Appeals stated:

> "Appellants flatly misread the Indiana opinion. The Indiana court said that '*coverage* is triggered at any

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[4] Judge Tamm died before the case returned to the Court of Appeals from the Indiana Supreme Court. Judge (now Justice) Scalia replaced Judge Tamm on the panel. Judge Wald subsequently recused herself and was replaced by Judge Edwards.

> point between ingestion of DES and the manifestation of a DES-related disease.' 482 N.E.2d at 471 (emphasis added). There is no requirement that diagnosable 'injury' be shown during the time the insurer is on the risk." *Id.* at 10a. (footnote omitted).

The Court of Appeals rejected the insurers' attempt to mount a constitutional challenge to the judgment of the district court, holding that the constitutional arguments had been waived. The court observed that "all of the rulings that appellants find to be constitutionally offensive were stated with some precision in the district court's memorandum opinion." *Id.* at 11a. Applying the settled rule that litigants must raise their claims in their initial appeal, the court held those issues waived.

Accordingly, the Court of Appeals affirmed the district court's declaratory judgment. The insurers' petition for rehearing and suggestion for rehearing en banc were denied without dissent. No member of the court requested a vote on the suggestion for rehearing en banc.

SUMMARY OF ARGUMENT

Indiana law governs this case. This is a diversity case in which the sole issue is the meaning of certain insurance policies under Indiana law. The Court of Appeals certified the dispositive interpretation issues to the Supreme Court of Indiana. The Indiana Supreme Court adopted the construction of the policy language urged by Lilly and adopted by the district court. In doing so, the Indiana court considered the issues and evidence that the insurers claimed were material to that construction, but ruled the issues raised by the insurers immaterial as a matter of state law. Accordingly, the federal Court of Appeals properly affirmed the district court's declaratory judgment. Given the authoritative interpretation of the policies under Indiana law by the Indiana Supreme Court, the Court of Appeals' judgment was compelled by fundamental *Erie* doctrine. It presents no question which has not been long ago resolved by this Court.

The insurers present no special or important reason for this Court to exercise its discretionary certiorari jurisdiction. Differing interpretations of insurance policy language made by various courts of appeals following the laws of different states present no conflict in the circuits within the meaning of Rule 17.1(A). Under *Erie*, such conflicts are inherent in our system of federalism and cannot be resolved by this Court.

The proper relationship between federal and state courts was observed. There are two short answers to the insurers' contention that the Court of Appeals improperly deferred to the Indiana court's determination that the policy language is ambiguous. First, the district court specifically held the language to be ambiguous. The insurers did not appeal from that determination; rather they embraced it, arguing that because of the ambiguity, they were entitled to present extrinsic evidence under Indiana law. Accordingly, the issue of ambiguity, whether characterized as a question of law or a factual determination, was not preserved in the Court of Appeals. Second, if the issue had been presented, under well-settled doctrine, the issue of ambiguity is itself clearly a question of state law under *Erie*. The basic position urged by the insurers—that contractual language can have some sort of fixed meaning as a matter of federal law, irrespective of the state law which is the source of the contract and governs its interpretation and construction—is simply a frivolous invitation to this Court to resurrect the discarded conception of law as a brooding omnipresence enunciated in *Swift v. Tyson*.

The constitutional issues were waived. The purported constitutional violations raised by the insurers were clearly waived. The district court held that the evidence proffered by the insurers was immaterial as a matter of state law and therefore entered summary judgment in favor of Lilly. If any colorable claim of constitutional violation occurred, it occurred when the district court

granted summary judgment. The insurers' failure to raise their constitutional arguments on appeal clearly constituted a waiver of these arguments.

The constitutional issues are frivolous. The reason the insurers' constitutional objections were not initially raised on appeal is that they are wholly lacking in merit. The insurers' constitutional arguments amount to no more than saying that any grant of summary judgment deprives the party opposing the motion of the opportunity to present its evidence at trial. But no party has a constitutional right to an unnecessary trial. The insurers' evidence was considered by the district court and determined to be immaterial. Hence there was no need for a trial. The Indiana Supreme Court confirmed that this evidence was immaterial under Indiana law. In short, the insurers were not treated fundamentally differently from any other contracting parties. Nor can a rule of construction promoting the basic purpose of a contract, which in the case of an insurance policy is indemnity, be considered to create a classification that is presumptively invidious. The Indiana rules of construction dealing with insurance policies are time-honored common law principles rooted firmly in the law of contracts and insurance. No issue of constitutional dimension is presented by the routine application of those principles to the insurance policies involved in this case.

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS' JUDGMENT WAS COMPELLED BY FUNDAMENTAL ERIE DOCTRINE

A week after this Court's landmark decision in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), this Court settled the only federal question presented by this case—whether state law governs questions concerning the proper construction of insurance policies. In *Ruhlin v. New York Life Insurance Co.*, 304 U.S. 202, 205 (1938), the Court held that the "subject is now to be governed . . . by the

decisions of the appropriate state court." Indeed, as tne Court in *Ruhlin* observed, even before *Erie* the federal courts were to defer to the appropriate state court's interpretation of specific provisions of insurance policies. In *Mutual Life Insurance Co. v. Johnson*, 293 U.S. 335, 340 (1934), Justice Cardozo, writing for a unanimous Court, stated:

> "All that is here for our decision is the meaning, the tacit implications, of a particular set of words, which, as experience has shown, may yield a different answer to this reader and to that one. With choice so 'balanced with doubt,' we accept as our guide the law declared by the state where the contract had its being."

In *Johnson*, confronted with an authoritative state court declaration as "to the meaning and obligation of [an insurance] policy . . . provision substantially the same as the one in controversy" before it, the Court concluded that it was

> "not under a duty to make a choice for ourselves between alternative constructions as if the courts of the place of the contract were silent or uncertain. Without suggesting an independent preference either one way or the other, we yield to the judges of Virginia, expounding a Virginia policy and adjudging its effect." 293 U.S. at 339.

In *Ruhlin*, this Court observed that the *Erie* decision "goes further, and settles the question of power." 304 U.S. at 205.

All that is involved in this case is the meaning of a particular set of words contained in Indiana insurance policies. The Indiana Supreme Court has authoritatively declared the meaning of those words, and under doctrine settled for a half a century, its decision is binding upon the federal courts. In summary, "the interpretation and legal effect of policies of insurance . . . are peculiarly matters of local concern." *Pink v. A.A.A. Highway Ex-*

press, Inc., 314 U.S. 201, 211 (1941). The insurers' basic arguments are nothing less than invitations to have a federal court substitute its construction of Indiana insurance policies for the one adopted by the Indiana Supreme Court, in derogation of settled *Erie* doctrine.

II. THERE IS NO CONFLICT IN THE CIRCUITS BECAUSE EACH APPLIED THE LAW OF A DIFFERENT STATE

The insurers observe that federal courts grappling with diversity actions over insurance coverage for time-delayed claims have adopted various interpretations of substantially the same policy language "purporting" to follow state law. Pet. at 10.[5] The insurers also note that some courts have held the language to be ambiguous, and others have held it to be unambiguous.

It is elementary that these conflicting interpretations present no question for this Court to review. "As to questions controlled by state law, . . . conflict among circuits is not of itself a reason for granting a writ of certiorari. The conflict may be merely corollary to a permissible difference of opinion in the state courts." *Ruhlin v. New York Life Insurance Co.*, 304 U.S. 202, 206 (1938). Here, since the interpretation of the policy language is governed by state law, the conflicting interpretations of the policies are directly attributable to the various federal courts' view of the law of the several states involved.

While in some of those cases it might be argued that the federal court incorrectly ascertained state law, or even failed to attempt to apply state law and instead applied its own view of the proper interpretation of the language, no such objection can be made to the judgment in this case. The Court of Appeals here certified the dispositive

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[5] Often these positions are the result of the application of the rule favoring the construction advanced by the insured. Different insureds have argued for different rules.

questions to the proper state court, eliminating all questions as to whether it was following state law.[6]

Notwithstanding this Court's clear pronouncements that state law governs the meaning of an insurance policy and that the federal courts must follow authoritative state court constructions of policy language, the insurers attempt to gin up a conflict in the circuits by characterizing the issue as one of fact, to be answered in a diversity action by an independent federal fact-finder.

The Fifth Circuit cases cited by the insurers, like the decision of the Court of Appeals in the case, are entirely consistent with this Court's pronouncements that a state court's interpretation of policy language is binding on a federal diversity court. No conflict in the circuits is remotely presented. Three of those cases, *Paul Revere Life Insurance Co. v. First National Bank in Dallas*, 359 F.2d 641 (5th Cir. 1966) (en banc); *St. Paul Mercury Insurance Co. v. Price*, 359 F.2d 74 (5th Cir. 1966); and *United Services Life Insurance Co. v. Delaney*, 358 F.2d 714 (5th Cir. 1966) (per curiam) (en banc), all involved the same coverage question and simply held that a Texas case construing "wholly different" policy language was distinguishable and hence not controlling. *Paul Revere Life Insurance Co. v. First National Bank in Dallas*, 359 F.2d at 643.[7]

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[6] Insurers refer to the call for review by one court based on a concern that "many of the courts involved are not even attempting to apply state law in reaching their results," *American Home Products Corp. v. Liberty Mutual Insurance Co.*, 565 F.Supp. 1485, 1512 (S.D.N.Y. 1983), *aff. as mod.*, 748 F.2d 760 (2d Cir. 1984). Whatever the merits of the view, it has no application here because the Court of Appeals clearly did apply Indiana law.

[7] Although the federal court in these cases ultimately itself held that the policy language in the cases before them was not ambiguous, prior to doing so, it had abstained from deciding the ambiguity issue and instructed the parties "to institute declaratory judgment proceedings in the Texas state courts for determination of coverage, a state question which presented the single issue in each of the

In *South Hampton Co. v. Stinnes Corp.*, 733 F.2d 1108, 1115 (5th Cir. 1984), the court held that it would adopt the interpretation adopted by an earlier state court "absent some indication that a later Texas court would do otherwise. . . ."[8] Here, of course, we have not just an indication but a declaration of Indiana law, and one made as recently as possible.

At bottom, petitioners' "conflict in the circuits" argument simply ignores the Indiana Supreme Court's dispositive holdings. The first of these is that given the Indiana view of the meaning of the concept "when" an "injury" is alleged to "occur" in the context of a delayed

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cases." *Paul Revere Life Insurance Co. v. First National Bank in Dallas*, 359 F.2d at 641. It was only *after* the state courts refused to entertain the declaratory judgment proceedings (on grounds that they sought advisory opinions) that the Fifth Circuit determined as best it could the coverage issue applying available indications of state law. Hence, the Fifth Circuit cases clearly present no conflict—the Fifth Circuit attempted to adopt the very approach taken by the Court of Appeals in this case, and the action of the Fifth Circuit in directing the parties to institute declaratory judgment proceedings in the Texas state courts directly refutes the insurers' argument that coverage issues under insurance policies are to be decided by reference to some non-existent body of federal common law, rather than state law.

[8] To the extent the *South Hampton Co.* decision suggests that the court would merely follow the state court's interpretation, and not in some abstract sense be bound by it, the decision on that question too was determined by the federal court as a matter of state law. The court indicated that because a later Texas court would not be bound by the prior state court's interpretation of the contract provision, the federal court acting as a court of the state under *Erie* principles would similarly not be technically bound. In any event, the difference between the Fifth Circuit's holding that it would follow the state court's construction absent indication that a later Texas court would do otherwise, and the explicit recognition that the state court's interpretation is "binding," where the state ruling is on certification in the same case represents no conflict in circuit doctrine. It is merely the application of that doctrine to different circumstances.

manifestation claim, the evidence proffered by the insurers was immaterial as a matter of Indiana law. The second is that the policy language is to be interpreted as a matter of Indiana law to provide multiple trigger coverage as held by the district court. The insurers assert that no court of appeals except the court in this case has ever sought to apply insurance policies to claims of injury while denying insurers the right to present medical evidence on the existence or not of injury.[9] But there is nothing odd about a court's holding that it is for the court to determine what a contract means. Neither the Indiana Supreme Court's holdings nor the Court of Appeals' application of them presents any conflict in the circuits for resolution by this Court.

III. THE INSURERS HAVE WAIVED ANY ARGUMENT CONCERNING THE AMBIGUITY OF THE POLICY LANGUAGE. IN ANY EVENT THE QUESTION IS ONE OF STATE LAW, NOT FACT

The insurers argue that the Court of Appeals should have determined whether or not the policy language was ambiguous for itself, and not deferred to the Indiana court's decision in this respect. Petitioners characterize the issue of ambiguity as one of fact and argue that a federal court sitting in a diversity case must determine the facts for itself.

First, the issue was resolved by a federal court. The district court in this case held that the language in question was ambiguous, applying the Indiana rule for determining ambiguity. The insurers did not appeal from that determination, and have received whatever federal determination of that issue to which they were arguably

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[9] As the Court of Appeals correctly observed, the insurers' argument amounted to an attempt "to transform the Indiana opinion from an adoption of the *Keene* multiple trigger rule into the 'injury in fact' view" adopted by the Second Circuit as New York law. Pet. App. A at 10a n.12.

entitled. Even if the Court of Appeals did not itself review that determination of the district court (and under the petitioners' theory the determination would be subject to a clearly erroneous standard of review) the insurers have no one to blame but themselves for failing to raise the issue on appeal.

Moreover, implicit in the Court of Appeals' decision certifying questions for review by the Indiana Supreme Court is a determination of ambiguity by the Court of Appeals. The Court of Appeals stated that the operative terms of the policy were not defined with precision, and significantly, certified questions to the Indiana Supreme Court which were only possibly germane if the language of the policies were deemed by it to be ambiguous.[10]

The insurers seize on the Court of Appeals' recent decision in *Abex Corp. v. Maryland Casualty Co.*, 790 F.2d 119 (D.C. Cir. 1986) (applying New York law). In *Abex*, the insurers argue, the court held the very same policy language to be unambiguous, and assert that *Abex* and this case cannot be reconciled on the basis that the common law of different states was involved. To the contrary, that is exactly the distinction between the cases, as *Abex* itself clearly demonstrates and as this case holds. Indeed, two of the three judges who decided this case also decided *Abex*. In *Abex*, New York insurance policies containing the standard form trigger language were at issue. The Second Circuit had already rendered a decision predicting how the New York courts would interpret the language, holding that the New York courts would view the language as unambiguous and adopting an injury in fact construction of the language. The *Abex* court, recognizing its obligation to apply New York

[10] In their petition for rehearing in the Court of Appeals, the insurers themselves recognized that the "certification opinion certainly indicates that [the Court of Appeals] may have deemed the language ambiguous . . . ." Pet. for Rehearing of Appellants at 8 (July 24, 1986).

law decided to "defer to the local circuit's view of the law of a state in its jurisdiction".[11] 790 F.2d at 125.

The insurers' argument boils down to the claim that it is impossible for the language to be unambiguous under New York Law and ambiguous under Indiana law because of the similarity between New York and Indiana standards for determining ambiguity. This is absurd. That is what the Indiana Supreme Court applying Indiana law and the Second Circuit applying New York law have held. Whatever the language of the opinions, the bottom line is that the district court held the policy ambiguous and the Indiana Supreme Court agreed. That holding is clearly correct on this record.

The determination of ambiguity vel non—indeed the very legal significance of even making a determination of ambiguity vel non—are solely questions of state law. They are merely one category of "questions concerning the proper construction" of insurance policies. *Ruhlin v. New York Life Insurance Co.*, 304 U.S. 202, 205 (1938).

It is well settled that the federal court sitting in diversity must follow state court determinations on the issue of ambiguity of an insurance policy. Justice (then Judge) Blackmun, when sitting on the Eighth Circuit, was presented with just that question in *Hanover Insurance Co. v. The Travelers Indemnity Co.*, 318 F.2d 306 (8th Cir. 1963). When confronted with an interpretative question of an insurance policy governed by Missouri law, Justice Blackmun surveyed the cases, ob-

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[11] The *Abex* court did opine in *dictum* that the Second Circuit's interpretation of the language was more consistent with its own reading of the insurance policies than was the multiple trigger interpretation. *Abex Corp. v. Maryland Casualty Co.*, 790 F.2d at 126. Nevertheless, *Abex* is crystal clear on the obligation of the federal court to follow *Erie*, and to give the policy language the same construction that would be adopted by the state court of last resort.

serving: "Some of these cases hold that the policy language is clear and unambiguous. Others conclude that it is ambiguous and resolve the ambiguity, as usual, against the insurer which issued the policy." *Id.* at 308. A prior Missouri case had declared the language to be unambiguous. Justice Blackmun, writing for the court, held that state decision "settled" the ambiguity question for the court. *Id.* at 308.

Petitioners cite no case in which a federal court refused to follow a state court's determination of ambiguity vel non with respect to an insurance policy governed by the law of that state. Indeed, the very cases cited by petitioners follow such state court determinations. In *Clay v. Sun Insurance Office, Ltd.*, 363 U.S. 207, 212 (1960), this Court vacated and remanded for the Court of Appeals to certify questions of the interpretation of policies to the state court, noting that these questions were "unresolved state law" questions, and further observing that the state court would "authoritatively" resolve such issues. In the appeal after remand, the court observed that the "meaning" of the insurance policy provision was a "local law question." *Clay v. Sun Insurance Office, Ltd.*, 377 U.S. 179, 180 & n.3 (1964). The state court had resolved the issue by applying the settled rule of construing an ambiguous insurance policy in favor of the insured. *Sun Insurance Office Ltd. v. Clay*, 133 So.2d 735, 739 (Fla. 1961).[12]

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[12] In *Barnes v. Atlantic & Pacific Life Insurance Co.*, 530 F.2d 98, 100 (5th Cir. 1976) (per curiam), also cited by petitioners, the court in fact deferred to the state court's interpretation of the meaning of the policy, including the issue of ambiguity. In another opinion in the same case the court stated: "We are acutely aware of how identical contract language takes on diverse meanings when viewed from opposite sides of that imaginary line separating two adjacent states. Understandably, policy considerations differ in their impact on the jurisprudence of individual states." 514 F.2d

In sum, once the Indiana Supreme Court ruled that the policy language was ambiguous as a matter of Indiana law, the federal diversity court is not free to substitute its own judgment for that of the Indiana Supreme Court. Were there a transcendental body of contract law existing outside of a state but obligatory within it, petitioners might have something to talk about. But there is no such body of contract law, and at bottom, petitioners' argument simply flies in the face of *Erie*.[13]

IV. PETITIONERS' CONSTITUTIONAL ARGUMENTS HAVE BEEN WAIVED AND IN ANY EVENT ARE FRIVOLOUS

Petitioners' asserted constitutional violations flow from the district court's entry of summary judgment. The insurers claim that decision deprived them of a meaningful opportunity to be heard and present what they claim to be relevant evidence in a trial on the merits. On appeal, however, the insurers did not attack the district court's judgment on due process or equal protection grounds.

704, 706. The court specifically certified the question of ambiguity. *Id.* at 709. Similarly, in *Tyler v. Insurance Co. of North America, Inc.*, 539 F.2d 1072, 1074 (5th Cir. 1976), the Fifth Circuit certified the question of the meaning of contractual provisions as applied to the facts and held that the state court determination was binding on it. Finally, "The Fifth Circuit's early suggestion [in *Sun Insurance Office Ltd. v. Clay*, 319 F.2d 505, 508-509] that answers to certified questions are 'merely advisory and entitled, like dicta, to be given persuasive but not binding effect as a precedent,' has long since been forgotten and it is now accepted that the state answers are binding." 17 C. Wright, A. Miller, and E. Cooper, Federal Practice & Procedure § 4248 at 532 (1978).

[13] A particular set of words may have a fixed legal meaning in one jurisdiction—a meaning of fixed, of course, by the courts of the state—which until the court adopts the construction, would otherwise be ambiguous and susceptible of various meanings. That is, of course, the result of this very litigation. An ambiguous provision in an insurance policy has now been given a clear legal meaning under the law that governs its construction.

They did not attempt to fashion a bootstrap procedural due process issue out of their argument that the district court erroneously determined that there were no material genuine issues of fact for trial. Nor did they assert any equal protection clause violation. Had the Court of Appeals, as urged by Judge Tamm, simply affirmed the judgment of the district court without certifying questions to the Indiana Supreme Court, it would be obvious that the insurers had waived any constitutional challenges to the district court's judgment.

The Court of Appeals correctly held that petitioners had waived their constitutional arguments by failing to raise them initially on appeal. As the Court of Appeals observed, once the district court rendered its decision, a constitutional attack on its construction of Indiana law was ripe for review. Moreover, all of the legal rulings that the insurers now allege to be constitutionally infirm were stated in the district court's opinion. If petitioners believed that the district court's judgment violated their constitutional rights, they were required to raise those issues on appeal. They did not do so. Rather, they wedded themselves to the argument that the district court's judgment was simply erroneous as a matter of Indiana law.

The petitioners' reliance on *Bellotti v. Baird*, 428 U.S. 132, 148 (1976) is misplaced. This Court's pronouncement in *Bellotti*—that in the context of that case it was impossible to define precisely the constitutional issues presented in the absence of an authoritative state law construction of a state statute—is wholly inapposite here. It is settled that this Court, as the ultimate expositor of the constitution, must be cautious in framing rules of constitutional law no broader than is absolutely necessary to decide the case before it. *See generally, Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). But, clearly *parties* cannot argue that they require an authoritative declaration by

the state supreme court before raising a constitutional challenge to state law. The parties in this case received a declaration of state law in the district court. If they wished to appeal it on these constitutional grounds they could have done so. They did not, and that is that.

The insurers' constitutional arguments are as meritless as they are untimely. The insurers' procedural due process argument is simply premised on a view of Indiana law explicitly rejected by the Indiana Supreme Court. Petitioners continue to maintain that their proffered evidence is material, and hence reason that the failure to consider that evidence deprived them of a meaningful opportunity to be heard. The short answer to petitioners' contention is that a party does not have a right to present immaterial evidence. Moreover, petitioners were granted a hearing appropriate to the nature of the case—namely a hearing on the motion for summary judgment.[14]

Petitioners' equal protection clause argument is equally meritless. The classification created by the Indiana common law is suspect, we are told, because it impinges upon petitioners' right to be heard. Having attempted to fashion a suspect classification out of an alleged procedural due process violation, the insurers continue by arguing that while Indiana has a legitimate governmental objective in promoting indemnity from insurance policies, the Indiana construction of this policy "furthers only an indemnity that is by definition unrelated to the contract's stated purpose." The "definition" to which the insurers refer is not the construction of the policy adopted by the

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[14] Petitioners also appear to be attempting to make a substantive due process argument as well, arguing that the Indiana common law somehow violates due process because one panel of the Court of Appeals of the District of Columbia opined that the multiple trigger interpretation of the policy language was "linguistically unsound." *Abex Corp. v. Maryland Casualty Co.*, 790 F.2d at 124-27. The proposition does not survive its statement.

Indiana Supreme Court, but is some still unspecified construction of the policy language about which the insurers themselves continue to disagree. It is axiomatic that the function of law is to classify, and that state law classifications relating only to business and economic interests are upheld under a rational basis test. Promoting indemnity is obviously a rational basis for a rule of construction governing insurance policies and the Constitution surely is not offended by holding the insurers to a legal construction of the written words by which they agreed to be bound.

For many reasons the Indiana rule is a wise one.[15] However, it is simply not this Court's function in our federal system to pass on the wisdom of the several competing interpretations of insurance policy language adopted by various courts applying the law of various states.

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[15] Indeed, the result reached here is almost universally recognized as the best of the judicial solutions to these coverage disputes. *See, e.g.*, Obremski, *"Toxic Tort" Litigation and the Insurance Coverage Controversy*, 34 Fed. Ins. C.Q. 3, 22 (1983); *Special Project—An Analysis of the Legal, Social and Political Issues Raised by Asbestos Litigation*, 36 Vand. L. Rev. 573, 726 (1983); Note, *Adjudicating Asbestos Insurance Liability: Alternatives to Contract Analysis*, 97 Harv. L. Rev. 739, 758 (1984); Note, *Insurer Liability in the Asbestos Disease Context—Application of the Reasonable Expectations Doctrine*, 27 S. Dakota L. Rev. 239, 257 (1982); Note, *Liability Cure-All for Insidious Disease Claims*, 11 Pepperdine L. Rev. 125, 143 (1983); Note, *Insurance Law And Asbestos—When Is Coverage of a Progressive Disease Triggered?* 58 Wash. L. Rev. 63, 87 (1982); Note, *Manifestation: The Least Defensible Insurance Coverage Theory for Asbestos-Related Disease Suits*, 7 U. Puget Sound L. Rev. 167, 182 (1983).

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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December 20, 1986

Supreme Court, U.S.
FILED
DEC 31 1986
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CLERK

NO. 86-822

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE HOME INSURANCE COMPANY, *et al.*,

Petitioners,

v.

ELI LILLY AND COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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LIST OF PARTIES

Petitioners incorporate by reference their list of parties contained in pages ii-v of their Petition for a Writ of Certiorari filed November 20, 1986, in Supreme Court No. 86-822. Petitioners also incorporate by reference their respective Rule 28.1 statements appearing in Appendix G thereto, except as to the petitioners also appearing in No. 86-818 who incorporate by reference the Rule 28.1 statement at page ii of that separate petition.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

PETITIONERS' REPLY BRIEF

I. THE FOURTH CIRCUIT IS NOW ALSO IN CONFLICT WITH THE DISTRICT OF COLUMBIA CIRCUIT.

The widening division among federal courts of appeal has now been exacerbated by the decision of the Fourth Circuit in *Mraz* v. *Canadian Universal Insurance Co.*, 804 F.2d 1325 (4th Cir. 1986), reported after the filing of the present petition in this Court. In *Mraz* the issue was insurance coverage for a time-delayed pollution loss; the policy language, substantially the same as that here and in the other cases cited by petitioners. Upon its own reading

of the language and consideration of the evidence developed at trial bearing on the facts of the claim, the Fourth Circuit concluded that coverage was triggered at the single point when the injuries first manifested themselves — a point held to be when the leakage and damage was first discovered. *Mraz* is thus inconsistent with *Lilly* not only in ultimate outcome but, more important for the purpose of the present petition, with respect to the proper fact-finding role of a federal court sitting in diversity. No differing general principles of state law are adequate to explain such divergent approaches to the making of factual decisions. For, as the First Circuit has observed,

> "[A]n argument between parties about the meaning of a contract is typically an argument about a 'material fact,' namely, the factual meaning of the contract." *Boston Five Cents Savings Bank* v. *Secretary of the Department of Housing and Urban Development,* 768 F.2d 5, 8 (1st Cir. 1985).

II. THE ISSUES PRESENTED BY THE PETITION WERE NOT RESOLVED IN *RUHLIN.*

Lilly directs this Court's attention to *Ruhlin* v. *New York Life Insurance Co.,* 304 U.S. 202 (1938), a companion case to *Erie Railroad Co.* v. *Tompkins,* 304 U.S. 64 (1938), in which this Court extended the *Erie* doctrine to suits in equity. The issue in *Ruhlin* was whether an insurer could rescind, because of fraud, the disability and double indemnity provisions of an insurance contract, notwithstanding (or, the insurer argued, as permitted by) the terms of an incontestability clause. As is apparent from this Court's opinion, the issue arose on a motion to dismiss the insurer's bill in equity. The record in this Court confirms the obvious point that, in that procedural context, the allegations in the insurer's bill were taken as true. There were, therefore, no factual matters in dispute outside the contract, nor was there any question

of determining whether particular facts existed that would give rise to coverage.[1]

As to *Clay* v. *Sun Insurance Office, Ltd.*, 363 U.S. 207 (1960), cited by both petitioners and respondents, it need only be noted that there was, again, no dispute whatever as to the facts upon which coverage was claimed. After certification, no party challenged the contract reading of the Florida Supreme Court. *Sun Insurance Office, Ltd.* v. *Clay*, 319 F.2d 505, 509 (5th Cir. 1963), *rev'd on other grounds sub nom. Clay* v. *Sun Insurance Office, Ltd.*, 377 U.S. 179 (1964). Lilly quotes Professor Wright's comment that, notwithstanding statements in the second *Clay* decision in the court of appeals, it is "now accepted that the state answers are binding." 17 C. Wright, A. Miller, & E. Cooper, *Federal Practice & Procedure* § 4248 at 532 (1978). The important question presented here, however, is "binding" as to what?

III. PETITIONERS' CLAIM OF RIGHT TO A FACTUAL DETERMINATION OF WHEN INJURY OCCURS WAS EXPLICITLY PRESERVED AT EVERY STAGE OF THIS CASE.

Lilly suggests that the insurers have waived their right to challenge the Court of Appeals' deference to Indiana with respect to

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[1] The federal authorities cited in *Ruhlin* differed on whether the incontestability provision was ambiguous, and the *Ruhlin* Court, which had granted certiorari because of that conflict, suggested that the conflict "may be merely corollary to a permissible difference of opinion in state courts." 304 U.S. at 206. That possibility, of course, continues to exist: one state might, as a matter of general state law, apply a doctrine of reasonable expectations; another might require that the actual intent of the parties be determined. *Ruhlin* nowhere suggests, however, that by a judicial ruling in a particular case — even if labelled one "of law" — a state may preempt the federal fact-finding function. If the Court's reference to "power" is taken to go that far, then it was surely clarified by *Byrd* v. *Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525 (1958) and its progeny, which explicitly preserve these independent federal functions in a post-*Erie* world.

the "factual predicate" of ambiguity and the "somewhat artificial legal meaning" of "injury." To the contrary, insurers have contended throughout these proceedings that the meaning of "injury" was not inherently ambiguous but, for its application to particular claims, did require consideration of scientific and medical evidence.[2]

Thus, in the District Court:

"Lilly therefore attempts to address the underpinnings of *Keene* by the following assertions:

(1) That '[a]mbiguity [of the policy language] is beyond dispute.'

. . . .

(5) That the underlying DES cases for which it seeks indemnity 'necessarily involve claims that injury occurs from ingestion through manifestation.'

As discovery to date has shown, however, *these and other issues of material fact are in substantial dispute.*" Statement of Points and Authorities of Defendants in Opposition to Plaintiff's Motion for Summary Judgment at 25-26 (emphasis added).

* * *

"Lilly, relying solely on the affidavit of a layman, disclaims knowledge of how DES might cause either adenosis or cancer . . . Against this disclaimer the defendants have proffered the affidavit of a medical expert thoroughly familiar with DES, establishing that:

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[2] In proffering their evidence that Lilly negotiated and drafted significant sections of the contracts, and applied the contract language and obtained money from the insurers on a basis inconsistent with the position it has urged in this lawsuit, the insurers assumed *arguendo* the ambiguity of the contractual language. With respect to the evidence concerning the application of the contractual language to the very claims for which Lily seeks reimbursement, however, the insurers never made any such concession.

> 'There is no clinical evidence that any of the conditions associated with DES arise out of a single continuous injurious process or entail a single course of injury running from maternal ingestion of DES to adulthood.' Burke Aff. ¶ 14.

This crucial point rests on substantial research and clinical work performed in the area. Burke Aff. ¶¶ 2, 3, 7." *Id.* at 14.

* * *

"Material *factual* disputes pervade every aspect of this case [including] . . . the nature of DES-related injury or disease." *Id.* at 29-30 (emphasis added).

* * *

"The interpretation of an ambiguous contract in light of available extrinsic evidence is a question of fact to be determined by the trier of fact and not by the court on summary judgment." *Id.* at 34.

* * *

"In all instances where DES is alleged to have caused an injury or disease, a specific moment at which the particular injury or disease occurred can be pinpointed — either at or about the time of the mother's ingestion or the time of the daughter's manifestation." *Id.* at 53.

* * *

"This dispute as to when an injury or disease caused by DES occurs puts in issue a material fact . . . ." *Id.* at 54.

The insurers' assertion of factual disputes with respect to when injury occurred was repeated — with citations to medical evidence — in the insurers' Statement of Genuine Issues and Supplemental Statement of Genuine Issues. *See* Supplemental Statement of Genuine Issues at 19-23.

It is quite true that the District Court found "injury" to be ambiguous, while at the same time refusing to consider any of the insurers' medical or scientific evidence. Far from acquiescing in this finding, however, the insurers challenged it on appeal.

Thus, in the Court of Appeals:

> "There is nothing invariably ambiguous about the policy language here at issue . . . This controversy results from the need to construe otherwise clear policy language 'when used in the context' of DES-related claims." Joint Brief of Defendants-Appellants at 49 n.34.
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> * * *
>
> "DES-related conditions do not occur throughout each point in time from ingestion through manifestation. . . ." *Id.* at 35.
>
> * * *
>
> "[E]ven assuming that under Indiana law the doctrine of 'objective reasonable expectations' must be applied, the District Court should have considered extrinsic evidence on the etiology of DES-related conditions. . . ." *Id.* at 37.

And, with respect to the role of federal law in determining whether disputed medical evidence and inferences precluded summary judgment, the insurers, having cited numerous federal cases, *id.* at 57, said:

> "Although this aspect of the case is governed by federal law, it may be noted that Indiana courts have consistently denied summary relief when confronted with material factual issues such as these." *Id.* at 58 n.39.

Lilly's assertions in the District Court and on appeal that *Keene* provided a "law of the circuit" entirely independent of controlling state substantive law did, without question, cause insurers to emphasize the importance of Indiana law to the ultimate resolution of this case. As the foregoing citations illustrate, however, it is equally clear that insurers contended from the outset, and on ap-

peal, that the District Court could not apply the language of a contract to claims of injury outside the contract without considering evidence from both parties concerning the existence of those injuries.

On certfication to Indiana, the insurers reiterated their position:[3]

> "The language is clear . . . in at least one respect: *something* must happen during the policy period to trigger coverage, and that something is 'injury.' That requirement applies to all claims, including later emerging time-delayed claims like those associated with DES. Yet medical evidence proffered by both sides showed that, at least with respect to cancer cases, *nothing* — and certainly nothing that could be called bodily injury — happens to the daughter during the period between ingestion of the drug and the appearance of the cancer." Joint Brief of Defendants-Appellants in Support of Petition for Rehearing at 17 (emphasis in original) (footnote omitted).

* * *

> "Interpretation of a insurance contract specifically linked to a policy period — even under rules of construction — requires

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[3] The parties were not given the opportunity to comment on the Court of Appeals' questions prior to certification, and that court's docket reflects that promulgation of the court's questions was immediately followed by transmission of those questions to Indiana. In this regard the District of Columbia practice departs from that indicated by Professor Wright as the better procedure. *See* 17 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 4248 at 530-31 (1978). In any event, however, the insurers' objection was not to the questions but to the use made by the Court of Appeals of the answers. Given the available procedures in Indiana, the Indiana Supreme Court's reception of insurers' rehearing filing "to consider questions on the merits when possible," and the full briefing in the Court of Appeals prior to that court's final decision, there is simply no basis for suggesting that the insurers failed to make their arguments in an appropriate way so as to preserve those contentions for this Court's consideration.

application of the language to the facts of what has occurred, and not occurred, during that period." *Id.* at 19-20.

With respect to the Indiana Supreme Court's statement that ambiguous insurance contracts are resolved as a matter of law, the insurers said:

"That rule applies only where the ambiguity is apparent on the face of the contract, not where the ambiguity arises from application of that language to a particular loss. . . . Lilly itself concedes that as to most claims 'no issue of interpretation of the policy is raised.' " *Id.* at 30 n.19 (citations and emphasis omitted).

And

"[A]ctions under federal diversity jurisdiction, including declaratory judgment actions, are subject to the Seventh Amendment to the U.S. Constitution. . . . While there are, of course, many decisions holding that the construction of contracts is a matter for the court, the finding of facts to which the contract is to be applied — here, for example, *when* bodily injury occurs — is classically a matter for a jury if one is claimed." *Id.* at 36 n.22 (emphasis in original) (citations omitted).

Finally, on post-certification proceedings in the Court of Appeals: *see, e.g.*, Joint Post-Certification Supplemental Memorandum of Defendants-Appellants at 5 n.3 (" '[W]hen the DES-related "injury" "occurs" ' is a fact, by definition, outside the language of the policy and, if it mattered, any ambiguity would therefore be 'latent.' "); at 6 ("[T]he existence or absence of 'injury' at any moment in time would seem to be quintessentially a question of fact . . . ."); at 10 ("The Indiana Decision . . . cannot be applied to these contracts, consistently with federal law, until the finder of fact has determined the time at which DES-related injuries occur . . . ."); and at 24 ("The finding of facts to which contractual language is to be applied — here, for example, the time at which bodily injury occurs — is classically a matter for a jury.").

Accordingly, contrary to Lilly's assertions, the record plainly shows that the insurers preserved the issues presented here: where the asserted ambiguity arose from the disputed facts about the DES claims themselves, then a federal court in diversity was required to base its decision on a federal resolution of those facts.

Respectfully submitted,

December 31, 1986

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